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PLEADING AND PRACTICE

UNDER THE CODES OF

OHIO, NEW YORK, KANSAS AND NEBRASKA

AND APPLICABLE, ALSO, TO THE PRACTICE IN OTHER STATES IN WHICH A CODE HAS BEEN ADOPTED

WITH APPROPRIATE FORMS

By SIMEON NASH

FOURTH EDITION, GREATLY ENLARGED

VOL. I

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PREFACE.

THERE seemed to be a call by the profession for a new and enlarged edition of this work. The favor it has met with calls for the grateful acknowledgments of the author, and encourages him in undertaking this enlarged edition of the work.

The present edition has been enlarged by the addition of over six hundred pages of new matter. In the first place, I have sought to cite all the decisions that have been made upon the *pleading and practice* under the code. I have consulted the reports of the Court of Appeals of New York, those of the Supreme Courts of Ohio and of Kansas, and have also examined the codes in those three States and that of Nebraska. These codes are substantially alike, so far as pleadings are concerned, and in much of their practice. In order to make the book an *authority*, I have not simply given my version of a decision, but I have copied the language of the court, so that its authority should be added to my own statement.

I have also added a large number of new forms of *petitions* and *answers*. The collection of forms of petitions in *negligence* will, I think, be found more copious and varied than in any other work. I have copied the most of them from cases actually decided, so that they may be considered as authority.

To these forms I have appended notes, presenting the law involved in the form. These notes are real *briefs* on the law presented in the form, and will be found very convenient to the profession, and save much labor to the practitioner. Questions of evidence, the rule of damages, and numerous other points are stated, and the cases referred to.

I have added a brief statement of the law in regard to *com-*

mon counts, having repeatedly witnessed mistakes made from a want of that knowledge. Young lawyers seem to regard the code as the sole guide in pleading; whereas, it only states well-recognized general principles, the application of which must be learned from a thorough study of the law, as embodied in reports and elementary works upon the various subjects of the law, as well as works on pleading, like those of Chitty, Gould, and Stephen.

I have also added a chapter on *quo warranto*, with accompanying forms, taken from cases decided. These will be found very convenient, since these forms are very difficult to find. As a *quo warranto* was originally a criminal proceeding, whatever forms there were, are found in works of criminal forms, and only in a few of those.

The index to a work like this, is a more difficult task than most, who have not tried their hand at it, may think. The forms for petitions and answers will be found under the head of Pleading, Torts, Promises, and Equity Forms. There are also other heads under which particular forms may be found; but by running through the above titles in the index, every petition in the work will be found. All the forms of *answers* will be found under that title, and under other titles particular forms may be found.

The plan adopted in the first edition has been adhered to in this. Experience has shown that these forms are the shortest and the most definite of any in use. In consulting the old forms, and in substance following them, I knew I was on safe ground, and presented a form that would stand all legal objections; whereas, to undertake in disregard of the wisdom of the past and create an entire new collection of forms as unlike the former as some practitioners seem to admire, I might be guilty of folly, and produce forms which would be known to stand a demurrer, when a court of last resort should have decided in favor of their validity. This would have been to introduce uncertainty and create disappointment to the profession. I was pledged and bound to give valid forms or none, unless I had been willing to practice a fraud on the profession. If I copied the substance

of a common-law declaration or plea, I knew I gave a form that could be relied on. These old forms, too, discriminate between what is *evidence* and what is *fact*. The code, like pleading at common law, requires *facts*, not *evidence*, to be stated, and hence the necessity of discriminating between the two. This is clearly done in all common-law forms of pleading; and hence the wisdom and necessity of consulting those forms. It is the only way in which the forms could be an *authority*, and not simply express the *opinion* of the author. It is believed that these opinions now generally prevail with the profession.

The work will be found useful and convenient to all lawyers, as the forms here given can easily be converted into a declaration or a plea; and the notes, attached to the forms, will be found labor-saving to any lawyer.

The forms in actions against railroads will be found fuller, I think, than in any other work that has come under my notice. This branch of the law and that of negligence are becoming very common and important, while the law on those subjects has grown up in the last twenty years, and no forms are found scarcely in the old books suited to the cases now constantly arising in practice.

I have endeavored to make this new edition worthy of the profession, whose arduous labors it is sought to relieve; and I submit it to the candor of my brethren, who know how to appreciate the value of an honest and earnest endeavor to present a work which may lighten their labors and command their confidence.

SIMEON NASH.

GALLIPOLIS, *October* 22, 1873.

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CONTENTS.

VOL. I.

CHAPTER I.

PRELIMINARY PROVISIONS OF THE CODE..... 1

CHAPTER II.

FORM OF CIVIL ACTION..... 2

CHAPTER III.

TIME OF COMMENCING CIVIL ACTIONS..... 6

CHAPTER IV.

PARTIES..... 21

CHAPTER V.

THE COUNTY IN WHICH ACTIONS ARE TO BE BROUGHT..... 61

CHAPTER VI.

COMMENCEMENT OF ACTIONS..... 64

CHAPTER VII.

APPEARANCE..... 87

CHAPTER VIII.

JOINDER OF ACTIONS..... 96

CHAPTER IX.

JURISDICTION OF THE COURTS..... 112

CHAPTER X.

PLEADINGS..... 114

CHAPTER XI.

DEMURRER..... 146

CHAPTER XII.

ANSWER..... 163

CHAPTER XIII.
Reply 259

CHAPTER XIV.
Verification of pleadings 270

CHAPTER XV.
Time to answer 277

CHAPTER XVI.
Supplemental petitions and answers 283

CHAPTER XVII.
Amendments 297

CHAPTER XVIII.
Forms of petitions 345

CHAPTER XIX.
Forms of demurrer 617

CHAPTER XX.
Forms of answers 619

CHAPTER XXI.
Equity forms 722

VOL. II.

CHAPTER XXII.
Arrest and bail 791

CHAPTER XXIII.
Replevin 812

CHAPTER XXIV.
Attachment 838

CHAPTER XXV.
Injunctions 882

CHAPTER XXVI

Receivers, and other provisional remedies..... 908

CHAPTER XXVII.

Evidence..... 923

CHAPTER XXVIII.

Issue..... 959

CHAPTER XXIX.

Trial..... 961

CHAPTER XXX.

Trial by the court..... 1009

CHAPTER XXXI.

Trial by referees..... 1014

CHAPTER XXXII.

Bill of exceptions..... 1032

CHAPTER XXXIII.

New trial..... 1038

CHAPTER XXXIV.

Judgments..... 1054

CHAPTER XXXV.

Master commissioners..... 1100

CHAPTER XXXVI.

Executions..... 1106

CHAPTER XXXVII.

Causes of action which survive, and abatement of actions..... 1182

CHAPTER XXXVIII.

Revivor of actions..... 1183

CHAPTER XXXIX.

Real actions..... 1194

CHAPTER XL.

Adm'ssion, inspection, etc., of papers and documents..... 1224

CHAPTER XLI.

Motions and orders 1228

CHAPTER XLII.

Error in civil cases 1283

CHAPTER XLIII.

Miscellaneous matters 1275

CHAPTER XLIV.

Record books 1300

CHAPTER XLV.

Proceedings upon mandamus 1304

CHAPTER XLVI.

Quo warranto 1317

CHAPTER XLVII.

Appeals and second trials 1340

CHAPTER XLVIII.

Partition 1347

CHAPTER XLVIX.

Dower 1359

CHAPTER L.

Divorce and alimony 1365

PLEADING AND PRACTICE

UNDER

THE CIVIL CODE.

CHAPTER I.

PRELIMINARY PROVISIONS OF THE CODE.

SECTION 1. This act shall be known as the Code of Civil Procedure of the State of Ohio.

SEC. 2. The rule of the common law, that statutes in derogation thereof, are to be strictly construed, has no application to this code. Its provisions, and all proceedings under it, shall be liberally construed with a view to promote its object, and assist the parties in obtaining justice.

This last section, of course, has no meaning, since it can not authorize the courts to make law. In Ohio, we never had any common law mode of procedure; it has always been regulated by statute. The rules of pleading were followed simply as indicating the form and facts to be stated in order to show a cause of action, or a matter of defense. They were never binding further than the law was binding. Hence, in Ohio, our forms had assumed a brevity unknown in New York and England. We adopted the new and short forms introduced into England by act of Parliament, and the rules of court under it, and did it without any legislation whatever. We adopted the principles of pleading and the code has done the same.

As to the recommendation that the code is to be liberally construed, we know not what that means. The courts must endeavor to ascertain its meaning, and that is all that construction can do; but this meaning, if possible, should be found to be in harmony with the object of the code. No court ever followed any other rule of construction, nor can any other be devised.

In our views upon the various provisions of the code, we have ever kept this rule in view; and hence have endeavored so to construe it as to make it a means of assisting parties in *obtaining justice.* If we have strained and liberally construed any of its provisions, it has been with the single object of shaping the code so as to make it a practicable mode of *obtaining justice.*

CHAPTER II.

FORM OF CIVIL ACTION.

SEC. 3. The distinction between actions at law and suits in equity, and the forms of all actions and suits heretofore existing, are abolished; and in their place, there shall be, hereafter, but one form of action, which shall be called *a civil action.*

This section is an important one, as it wipes out all the past, and leaves the field swept for the erection of the new edifice. This section, however, abolishes only *forms* and *classification.* The first is easy; the second can not be done, since classification is founded in the nature of things. Though a suit at law and a suit in chancery may both be called *a civil action*, the inherent difference between the two remedies still exists, and will continue to exist, until the whole structure and object of equitable remedies founded upon equitable principles are changed or abolished.

Classification has hitherto been regarded as the great triumph of science, as its great mission. To observe facts, to obtain a knowledge of individuals, and to arrange these facts and individuals into classes according to some discovered relation, is the first rule and law of scientific progress—the road that all science must travel in its progress toward a perfect development. The civil law has been subjected in its development to this necessary law of all science; and

the various actions and remedies were the result of this progress, the classification of its facts and remedies being based upon the relation existing among them.

The code reverses the scientific process, ignores all classification, and throws the whole science again into a single class—into a multitude of individual facts, without any law of aggregation or arrangement. The law started in the remote past from this point, and has, under the so-called spirit of reform, but really of destruction, again returned to it. In no other science would such an absurdity have been tolerated, nay, not even thought of, but to be ridiculed.

There is now to be but *one form* of action. This can not be. The *form* of an action is the *manner* in which the facts constituting the action are to be stated. This statement must be as various as are the facts which constitute a right of action. The construction to be given to this language must be that there is to be but one *kind* or *class* of actions, while the *form* of each action must correspond to the nature of the facts and law on which it rests. The form of an action founded on principles of equity must always differ from one founded on legal rights; while an action to recover a sum of money must, in its form, ever differ from one to recover specific real or personal estate.

The code then creates a single class of actions; makes every action an action *on the case*—an action on the peculiar facts of that case, without any regard to classes of actions; and yet this very effort to ignore classification is violated, since the code speaks of actions *to recover money, to recover specific real property, to recover specific personal property, and all other actions.* Here are four classes of actions distinctly shadowed forth, and which, being founded in the very nature of things, will undoubtedly become the origin of a new classification of actions to grow up under the code itself. These will again give occasion for subdivisions, until order shall be educed out of the chaos created by the code. The human mind must classify and arrange, and even legislation can not prevent it.

The whole body of the law, whether administered in a court of law or in a court of chancery, is left in full vigor. The *remedy*, not the law, is changed; nor does the *remedy* indeed seem to be changed; it is rather the *name* than the *thing*. The object heretofore sought by a bill in chancery must still substantially be sought by the same *mean*, though now called a *civil action*, instead of a *bill in chancery;* and an action on a promissory note, or other contract, must still assume the shape of an action at law, though un-

der a new name. The law remains the same, facts will repeat themselves, and a cause of action can not be stated very much differently from what it has heretofore been stated. Where the facts and the law are the same, the cause of action must be stated substantially in the same form; and hence a new classification will gradually grow up under the code, as it grew up under the common law, but not with the same rigidity; since under the code, classification will be a mere matter of convenience, and not a law of necessity; so that an action may be amended from the one class into another, according to the nature of the case itself, as developed in court.

The view here taken of this code is sustained by the rulings of the court. In Cole *v.* Reynolds, 18 N. Y. 74, Harris, J., says: "By the code, the distinctions between actions at law and suits in equity is abolished. The course of proceeding in both classes of cases is now the same. Whether the action depends upon legal principles or equitable, it is still a civil action, to be commenced and prosecuted without reference to this distinction.

"But, while this is so with reference to the form and course of proceeding in the action, *the principles* by which the *rights* of the parties are to be determined, remain unchanged. The code has given no new cause of action. In some cases, parties are allowed to maintain an action who could not have maintained it before; but in no case can such an action be maintained where no action at all could have been maintained before upon the same state of facts. If, under the former system, a given state of facts would have entitled a party to a decree in equity in his favor, the same state of facts now, in an action prosecuted in a manner prescribed by the code, will entitle him to a judgment to the same effect. If the facts are such as that, at the common law, the party would have been entitled to judgment, he will, by proceeding as the code requires, obtain the same judgment. The question, therefore, is, whether, in the case now under consideration, the facts, as they are assumed to be, would, before the adoption of the code, have sustained an action at law, or a suit in equity."

This view of the code is the one generally taken. Rights are neither changed nor created by the code. What was an action at law before the code is still an action founded on *legal* principles; and what was a bill in equity before the code, is still a civil action, founded on principles of equity; what state of facts ended before the code in a decree in equity, must still end in what is now called a judgment, but which is in fact a decree in equity. There is

nothing in the code converting equitable rights into legal. What was an equitable right before the code is an equitable right still; and the same result is to be sought and obtained in a civil action under the code as was formerly obtained under a bill in equity; and the same judgment on the same facts is now to be obtained under the name of a civil action, as was formerly obtained by the various forms of action then recognized. They are all special actions on the peculiar facts presented in each case; but the distinction between law and equity is still kept up from necessity. There is a radical difference between the two classess of rights and remedies, and they can not, in the nature of things, be confounded the one with the other. Petition and the proceedings in actions at law are radically different from a petition founded on equitable principles; nor can it be otherwise, legislate as we may. Legislation can not change the nature of things; and it is the part of wisdom to recognize and acknowledge this iron inflexibility of facts and principles.

SEC. 4. In such action, the party complaining shall be known as the *plaintiff*, and the adverse party as *defendant*.

SEC. 5. There can be no feigned issues; but a question of fact not put in issue by the pleadings may be tried by a jury, upon an order for the trial, stating distinctly and plainly the question of fact to be tried, and such order is the only authority necessary for a trial.

Feigned issues were never in practice in Ohio. Courts were in the habit, in chancery cases, of submitting some question of fact arising in a case to a jury, and this was done under a simple order of the court. The code sanctions this practice, and it is a very convenient one. Of course it applies only to cases of an equitable nature, since, in all others, the parties are entitled to *demand* a jury trial.

CHAPTER III.

TIME OF COMMENCING CIVIL ACTIONS.

I. *Actions in General.*

SEC. 6. This title shall not apply to actions already commenced, or to cases where the right of action has already accrued; but the statutes now in force shall be applicable to such cases, according to the subject of the action, and without regard to the form; nor shall this title apply in the case of a continuing and subsisting trust, or to an action by a vendee of real property, in possession thereof, to obtain a conveyance of it.

SEC. 7. The act entitled "an act for the limitation of actions," passed February eighteenth, one thousand eight hundred and thirty-one; the one hundred and sixtieth section of "an act to provide for the settlement of the estates of deceased persons," passed March twenty-third, one thousand eight hundred and forty; and the second section of "an act to give additional security to land titles in this State," passed March twenty-second, one thousand eight hundred and forty-nine, are hereby repealed.

SEC. 8. Civil actions can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued; but where, in special cases, a different limitation is prescribed by statute, the action may be commenced accordingly.

II. *Action for the Recovery of Real Property.*

SEC. 9. An action for the recovery of the title or possession of lands, tenements, or hereditaments, can only be brought within twenty-one years after the cause of such action shall have accrued.

SEC. 10. If a person entitled to commence any action for the recovery of the title or possession of any lands, tenements, or hereditaments, be, at the time his right or title shall first descend or accrue, within the age of twenty-one years, a married woman, insane, or imprisoned, every such person may, after the expiration of twenty-one years from the time his right or title first descended or accrued, bring such action within ten years after such disability is removed, and at no time thereafter.

SEC. 11. An action for the forcible entry and detention, or forci-

ble detention only, of real property, can only be brought within two years after the cause of such action shall have accrued.

There have been some decisions under these sections relating to real estate. In Lane *v.* Kennedy, 13 Ohio St. 42, the court held in conformity to the case of Fox *v.* Harte, 11 Ohio, 414, that, if the owner of lands adjoining a public highway, regularly laid out and used by the public, extended his fence so as to inclose a portion of the grounds within the surveyed lines of the highway, which portion was not then used nor required for the public travel, and kept up said fences without any objection for upward of twenty-one years, he did not acquire a title by the statute of limitations, since the possession was not necessarily adverse, the public then having no use for that part so inclosed. This decision does not decide that there may not be an adverse possession against the public. Where a man builds his house on what was treated as a line of a street or highway, that is surely such an act as would be adverse to the public right, and the statute would run. The case of Cincinnati *v.* Platt Evans, 5 Ohio St. 594, holds that in such a state of facts the statute would run, as was held in Cincinnati *v.* Presbyterian Church, 8 Ohio, 298.

In the case of Yetzer *v.* Thoman, 17 Ohio St. 130, the court held that, where adjoining proprietors hold by open, notorious, and continuous possession for twenty-one years, up to a certain line, which turns out not to be the true line, the parties each acquire title to the land up to the line so occupied by each respectively.

III. *Actions other than for the Recovery of Real Property.*

Sec. 12. Civil actions other than for the recovery of real property, can only be brought within the following periods after the cause of action shall have accrued.

Sec. 13. *Within fifteen years.*

An action upon a specialty, or any agreement, contract, or promise in writing.

In the case of Bobo *v.* Norton, 10 Ohio St. 514, the court held that a recognizance for the stay of an execution on a judgment before a justice of the peace was a *specialty*, and therefore barred by fifteen years under section 13 of the code; so that an action of debt in this State, upon a judgment rendered in the State of Indiana by a justice of the peace, is a *specialty*, and barred in fifteen years under section 13 of the code. Stockwell *v.* Coleman, 10 Ohio

St. 33. But in the case of Tyler's Ex'r *v.* Winslow, 15 Ohio St. 364, the same court held that a judgment of a court of this State is not a specialty, and the statute of limitations does not apply to such a judgment. The court say that in the case of Stockwell *v.* Coleman, 10 Ohio St. 33, it was held that a judgment of a court of another State is to be regarded as a specialty under the statute of limitations of this State. But is a judgment of a court of this State a specialty within the meaning of this statute? There is a wide difference between the legal significance and effect of a domestic judgment and that of the judgment of another State. This court, however, is of opinion that the judgments of the courts of this State are not subject to any of the provisions of the section under consideration.

The court seems to overlook one fact. It says no action accrues on the rendition of a judgment. Is this true? Can not an action of debt be maintained on a judgment? There are two remedies on a judgment: one by execution or one by action. Now, his right to the action accrues as soon as the judgment is perfected. If the party resorts to an action, his right is to be tried as in any other case. When had he a right to bring the action? So soon as that right exists, the statute begins to run, and that right accrues from the completion of the judgment, from the time the court rises, for then the judgment is complete. There is the same reason to bar an action in this case as in any other. Nor has this anything to do with his remedy by execution; that depends upon an entirely different state of facts.

SEC. 14. *Within six years.*

An action upon a contract not in writing, express or implied.

An action upon a liability created by statute, other than a forfeiture or penalty.

In the case of Neilson & Churchill *v.* Fry, 16 Ohio St. 552, the court held that the right of subrogation by a surety to a judgment, who had paid it off, was limited to six years, as his legal action for money paid was barred in that time. In other words, the party seeking subrogation is seeking the aid of a court of equity to enforce the collection of a legal claim, and if there is no legal debt or claim to be paid, there can be no right to the aid of the court in the collection of a debt which no longer exists. The same doctrine was asserted and enforced in Pennsylvania, in cases of Rittenhouse *v.* Levering, 6 Watts & Serg. 190, and of Fink *v.* Mahaf-

fey, 8 Watts, 384. The error, say the court, on this head, arises from the assumption that, *ipso facto*, on payment of the money the surety is subrogated to the rights of the creditor; whereas, the remedy is not *prima facie* on the bond, but for money paid, although the surety may, if he choose, invoke the aid of the equitable principle of subrogation.

The principle is the same in all cases where the aid of a court of equity is invoked to enforce a legal right or the collection of a legal debt. If the legal right is barred by the statute, equity follows the law and declines to interfere. If there is no legal right, no equitable right can be set up. The statute of limitations is a bar in equity as well as at law. 36 Penn. St. 77, Pittsburg R. R. Co. *v.* Graham. The rule is thus stated by Smith, J., in Rundle *v.* Allison, 34 N. Y. 180, 182: "The rule is, that where there is a legal and equitable remedy in respect to the same subject-matter, the latter is under the control of the same statute bar with the former." 7 Johns. Ch. 90; 7 Paige, 195; S. C., affirmed 24 Wendell, 587; 15 N. Y. 505. In the case where a surety pays money for his principle, he has a legal remedy in an action for money paid; and when this remedy at law is barred, so are all remedies in equity for the collection of the same debt. This question was much discussed in the case of Borst *v.* Corey, 15 N. Y. 505.

This was an action seeking to enforce a vendor's lien on the land sold for the purchase money, and the objection was interposed that the action at law for land sold was barred by the six-year clause of the statute, there being no written agreement to pay. The court held that an action to enforce the equitable lien for purchase money of land was barred by the lapse of six years after the debt accrued. Bowen, J., thus states the law in the opinion of the court: "An action at law, if commenced at any time within six years after the conveyance, could have been maintained against the defendant Corey, in which a judgment against him personally would have been rendered. The object of such an action, and the relief sought for therein, would have been the recovery of the unpaid purchase price of the land. The same relief, and no other or different, is sought to be obtained in this action; and a court of equity was resorted to solely for the reason that courts of common-law jurisdiction could not award relief otherwise than by a judgment against the defendant personally. The same facts, which would constitute a defense to the action at law, would also be a defense to this action, unless the statute of limitations be an exception.

"Prior to the revised statutes, there was no statute in this State

limiting the time of commencing actions in courts of equity. Yet previously to the adoption of those statutes, it was frequently held that, in cases where there was a concurrent jurisdiction at law and in equity, time was as absolute a defense to the action in equity as to one at law—not on the ground of expediency, or as a matter of discretion founded on analogy to the statute of limitations, as was the case in some actions of purely equitable cognizance, but in obedience to the statute of Roosevelt *v.* Mark, 6 Johns. Ch. 266; Kane *v.* Bloodgood, 7 Ib. 90; Murray *v.* Coster, 20 Johns. 576; Sawyer *v.* De Meyer, 2 Paige, 574; Humber *v.* Trinity Church, 7 Ib. 195; 24 Wend. 587; Story's Eq., sec. 529.

"I think this case comes within the principle established by the above authorities, and that, independently of the statutory provision limiting the time of commencing actions in courts of equity, it should be held that the six years' limitation of actions at law constitutes a defense to this action. The provision of the revised statutes, limiting the time of commencing actions in courts of equity, was adopted as declaratory of the law as it then existed, and not as introducing a new rule.

"It would be an anomaly if the plaintiff could recover his debt by an action to enforce the lien given to secure the debt, when no action could be sustained to recover the debt directly without reference to the lien. There is no reason why the limitation should be applicable in the one case and not in the other.

"But there is a material distinction between a mortgage and the equitable lien for the purchase money of land given by law, and also between an action to foreclose a mortgage and one to enforce such a lien. The action to foreclose a mortgage is brought upon an instrument under seal, which acknowledges the existence of the debt to secure which the mortgage is given; and by reason of the seal, the debt is not presumed to have been paid until the expiration of twenty years after it becomes due and payable. The six years limitation has no application to a mortgage. In fact, all instruments under seal are expressly excepted therefrom. No action at law can be predicated upon the mortgage to collect the debt secured thereby, unless there is contained therein a covenant to pay the debt. A debt secured by deed is said to be of a higher nature than one by simple contract. On the contrary, the equitable lien is neither created nor evidenced by deed, but arises by operation of law, and is of no higher nature than the debt which it secures. It must co-exist with the debt and can not survive it." *Vide* Littlejohn *v.* Gordon, 32 Miss. 235, S. P.

The same language is applicable to the right of subrogation. It is neither created nor evidenced by deed or other writing, but arises by *operation of law*, and can, therefore, be of no higher nature than the debt which it secures. It is an action upon a contract not in writing implied by law. Such is the relation of principal and surety when the surety has paid the debt. The law implies a promise on the part of the principal to repay the surety the money so paid by him for his principal. This is a cause of action coming expressly within the words of section 14. Section 18 provides only for cases not therein before provided for; but money paid has been therein before provided for, and limited to six years. If this is not the construction, then there is a double limitation for a certain class of cases, which the statute takes special care to avoid by the language of section 18. There is now no distinction between law and equity; both come within the words of the statute, and it would be strange, if under such a statute, the plaintiff could by simply changing the form of his petition secure for his cause a six or ten years' limitation.

Our courts have asserted the same doctrine. In the case of Larrowe *v.* Beam, 10 Ohio, 498, Grimke, J., says: "The court act in obedience to the statute when, if the claim were asserted at law, the statute would afford the rule. . . . If there is a statute of limitations in force, a court of equity acts not merely in analogy to it, but in strict obedience to its provisions." The same doctrine is re-asserted in the case of Horton *v.* Horner, 14 Ohio, 437, Hitchcock, J.: "As a defense the defendant sets up the statute of limitations both of the States of New York and Ohio. Courts of chancery regard such statutes as much as courts of law; for if they do not, still a claim, which would be barred at law, must, if prosecuted in chancery, be governed by the same rule." Vide also 13 Ohio, 452; Ormsby *v.* Longworth, 11 Ohio St. 667.

In Elmendorf *v.* Taylor, 10 Wheaton, 152, it is said that although the statutes of limitations do not properly extend to suits in chancery, yet the courts universally acknowledged their obligation.

The same doctrine is maintained in the following cases: Smith *v.* Remington, 42 Barb. (N. Y.) 75, applied to a suit to collect a legacy; Grattan *v.* Wiggins, 23 Cal. 16; Bank of Gettysburg *v.* Thompson, 3 Grant, (Penn.) 114; Harris *v.* Mills, 28 Ill. 44; Albro *v.* Dayton, 28 Ill. 325; Taylor *v.* McMurry, 5 Jones' Eq. (N. C.) 357; Leggett *v.* Coffield, Ib. 382. An action to annul a conveyance and recover back the consideration paid for a mistake as to the quantity of the property conveyed, is subject to the same lim-

itation as an action at law to recover back the money. Smith *v.* Fly, 24 Texas, 345; Knight *v.* Bowner, 14 Md. 1; Wright *v.* Leclaire, 3 Clarke (Iowa), 221; Wilson *v.* Anthony, 19 Ark. 16; Brooks *v.* South Car. R. R. Co., 8 Rich's Eq. (S. C.) 30. In all cases of concurrent jurisdiction between courts of law and equity, the statute of limitations is equally obligatory in each court. Teakle *v.* Gibson, 8 Md. 70; Manning *v.* Warren, 17 Ill. 267; Finney *v.* Harris, 30 Miss. (1 George,) 36; Sugg *v.* Thrasher, 30 Miss. 135; Manchester *v.* Mathewson, 3 R. I. 237; Hamilton *v.* Hamilton, 18 Penn. St. 20; Sidam *v.* Williams, 4 McLean, 31; Lindall *v.* Campbell, 6 Gill, 430; Dudley *v.* Price, 10 B. Mon. 84; Phalen *v.* Clark, 19 Conn. 421; Perkins *v.* Cartmill, 4 Harring. 270; Wagstoff *v.* Smith, 4 Iredell's Eq. 1; Lex. & Ohio R. R. Co. *v.* Bridges, 7 B. Mon. 556; Pratt *v.* Northam, 5 Mason, 95; Beerdell *v.* Grew, 8 Pick. 108; Farnam *v.* Brooks, 9 Pick. 212; Burdoin *v.* Shelton, 10 Yerg. 41; 5 Blackf. 506; 2 Gill & Johns. 307; Bank United States *v.* Daniel, 12 Pet. 32; 7 Yerger, 9; 27 Miss. 772.

The right to subrogation does not depend on contract, but rests on principles of justice and equity. 1 N. Y. 595.

These authorities show that the law is well settled that when there is a legal debt for the collection of which two remedies exist, one at law and one at equity, if the remedy at law is barred, so is the remedy in equity. The right reason for the rule may not always be given, but the correct rule is everywhere recognized. The true reason of the rule grows out of the character of the jurisdiction of a court of equity. It is of a twofold character: it is in aid of a legal right in the one class, and in the enforcement of rights purely equitable, of which a court of law took no jurisdiction. In the former case, if there is no legal right existing, there is no debt or claim for the enforcement of which the aid of a court of equity can be invoked. In these cases equity furnishes, not a *right*, but a *remedy* for a right existing at law, which remedy a court of law can not furnish. What equity does, is to furnish an equitable remedy for a legal right; but if there is no legal right, no ground is laid for the remedy afforded in equity in aid of legal rights. In the other class of cases, of which a court of law never had jurisdiction, the statute never did apply. In this class equity creates both the right and the remedy. Of these questions courts of law never did recognize the right. Here lies the distinction. The remedy on a mortgage in ejectment was barred in twenty-one years, and hence a court of equity would not foreclose the mortgage after that lapse of time. This distinction will reconcile all

the cases, and harmonize what at first may seem conflicting in the decisions.

SEC. 15. *Within four years.*

An action for trespass upon real property.

An action for taking, detaining, or injuring personal property, including actions for the specific recovery of personal property, provided that in an action for the wrongful taking of personal property, the cause of action shall not be deemed to have accrued until the discovery of the wrong-doer.

An action for an injury to the rights of the plaintiff, not arising on contract, and not hereinafter enumerated.

An action for relief on the ground of fraud. The cause of action in such case shall not be deemed to have accrued until the discovery of the fraud.

Prior to this amendment the wrongful taking of goods was barred in four years, though the taking was larceny and the taker concealed his guilt. How *v.* Minnich, 19 Ohio St. 462.

As to cases of fraud, *vide* Foote *v.* Farrington, 41 N. Y. 164.

SEC. 16. *Within one year.*

An action for libel, slander, assault, battery, malicious prosecution, or false imprisonment.

An action upon a statute for a penalty or forfeiture; but where the statute giving such action, prescribes a different limitation, the action may be brought within the period so limited.

SEC. 17. An action upon the official bond or undertaking of an executor, administrator, guardian, sheriff, or any other officer; or upon the bond or undertaking given in attachment, injunction, arrest, or in any case whatever required by statute, can only be brought within ten years after the cause of action shall have accrued; but this section shall be subject to the qualification in section 8.

In King *v.* Nichols et al., 16 Ohio St. 80, it was held that an action against a sheriff on his bond for a breach was limited by ten years.

Did not the court lose sight of one thing? Was it not limited by the law, which would bar an action against the sheriff alone? His bond is a security for ten years for all actions that could be prosecuted personally against the sheriff; but bail or sureties are not bound at any rate over ten years. An action for money had

and received would lie against a sheriff, and that is barred in six years. An action for an injury to the rights of plaintiff would embrace a false return, a failure to levy, etc., and is barred in four years. Such were the rulings under prior statutes, and it would be strange to extend a sheriff's liability to ten years, when heretofore it was limited to one. Such a construction was wrong to sheriff and his sureties. It was so decided in State *v.* Blake, 2 Ohio St. 147, and also in the case of The State *v.* Newman, 2 Ohio St. 567. When a sheriff has received money as such, and refused to pay it over on demand, he may be sued in tort, and then the action would be barred in one year, and the tort being waived, he may be sued in assumpsit for money had and received, and then the action would be barred in six years. Ib. I can see no reason in the code to change this rule of construction. While the one-year limitation is left out, his wrongful neglect as an officer comes clearly within section 15 of the present act, fixing the limitation at four years. Before the code there was no limitation on an official bond; nor can I see in section 17 any other object than that to protect sureties by limiting any action on an official bond to ten years. It is monstrous to extend the limitation of actions against officers from one to ten years, when the other provisions of the statute apply to officers as well as to other persons.

In the case of Ohio *v.* Orr et al., 16 Ohio St. 522, it was held that the limitation in favor of fees received by him and not paid over to county treasurer was ten years under section 17, and not four years under section 14.

In New York, in the case of Bruce *v.* Tilson, 25 N. Y. 194, it was held that an action for specific performance of a contract to convey land was limited by ten years, by a section similar to section 17 of the code.

SEC. 18. An action for relief, not hereinbefore provided for, can only be brought within ten years after the cause of action shall have accrued.

SEC. 19. If a person, entitled to bring any action mentioned in this chapter, except for a penalty, or forfeiture, be, at the time the cause of action accrued, within the age of twenty-one years, a married woman, insane, or imprisoned, every such person shall be entitled to bring such action within the respective times limited by this chapter, after such disability shall be removed.

VI. *General Provisions.*

SEC. 20. An action shall be deemed commenced within the meaning of this title, as to each defendant, at the date of the summons which is served on him, or on a co-defendant who is a joint contractor, or otherwise united in interest with him: where service by publication is proper, the action shall be deemed commenced at the date of the first publication, which publication must be regularly made.

This section applies to the commencement of a petition in error. It is not commenced by mere filing of petition. The rule as to when it is commenced is found in this section. Robinson *v.* Orr, 16 Ohio St. 284.

An attempt to commence an action shall be deemed equivalent to the commencement thereof, within the meaning of this title, when the party faithfully, properly, and diligently endeavors to procure a service; but such attempt must be followed by service within sixty days.

SEC. 21. If, when a cause of action accrues against a person, he be out of the State, or have absconded or concealed himself, the period limited for the commencement of the action shall not begin to run until he comes into the State, or while he is so absconded or concealed; and if after the cause of action accrues, he depart from the State, or abscond, or conceal himself, the time of his absence or concealment shall not be computed as any part of the period within which the action must be brought.

The code of New York has a provision nearly identical with this section 21. In the case of Cole *v.* Jessup, 10 N. Y. 96, the Court of Appeals of that State held that under that section it is sufficient for the defendant, in averring his return to the State, to allege that he "returns publicly to this State," without showing the circumstances of such return, or that the plaintiff had notice of it. The court also held this statute to apply to a person residing out of the State; our statute expressly includes them. Under the statute successive absences of the debtor from the State may be accumulated, and their aggregate deducted from the period of limitation. Tilden, J., says, that it having been held in several cases—to wit: Fair *v.* Roberdeau, 3 Cranch, 174; Fowler *v.* Hunt, 19 Johns. 464; White *v.* Bailey, 3 Mass. 271; and Little *v.* Blunt, 16 Pick. 369—that defendant pleads a return under the statute, he is bound to prove all the facts necessary to make such return

effectual; although none of these facts are expressly averred, it follows that the plea can not be defective for want of such averment; that if the averment adds nothing to the proof which the defendant is under obligation to produce, it can not be necessary to the validity of the plea."

In the case of Denny *v.* Smith & Hall, 18 N. Y. 567, the same court held that the absence of one joint-debtor from this State suspends the running of the statute of limitations against him, although his co-debtor has remained within the State. This decision is based on the proposition that the exemption of the statute is a personal privilege, to be taken advantage of alone by the party coming within its purview; and this is the true construction of the statute.

SEC. 22. Where the cause of action has arisen in another State or country between non-residents of this State, and by the laws of the State or country where the cause of action arose, an action can not be maintained thereon by reason of lapse of time, no action can be maintained thereon in this state.

SEC. 23. If an action be commenced within due time, and a judgment therein for the plaintiff be reversed, or if the plaintiff fail in such action otherwise than upon the merits, and the time limited for the same shall have expired, the plaintiff, or, if he die, and the cause of action survive, his representatives, may commence a new action, within one year after such reversal or failure.

SEC. 24. In any case founded on contract, when any part of the principal or interest shall have been paid, or an acknowledgment of an existing liability, debt, or claim, or any promise to pay the same, shall have been made, an action may be brought on such case within the period prescribed for the same, after such payment, acknowledgment, or promise; but such acknowledgment or promise must be in writing, signed by the party to be charged thereby.

By the act of February 9, 1863 (60 Ohio L. 5), it is provided that, if a cause of action shall have existed, or accrued, or shall exist and accrue, in favor of or against any person, who has been or shall be engaged during the present war in the military or naval service of the United States, or of this State, the time of such service shall not be counted as a part of the time of limitation.

The language of this section would not affect nor can affect any cause of action barred at the time the act took effect; it can only apply

to causes of action existing and not barred at the date of its passage. No *retroactive* law can be passed by our legislature. Slipp *v.* Brown, 2 Carter, (Ind.) 647; Girder *v.* Stevens, 1 Heiskill, 280; S. C., 2 Am. Rep. 700; 2 West. Law Journal, 170, 197; Cooley on Const. Law, 349; Sedgwick on Stat. 177; Paschal *v.* Perez, 7 Texas, 348; Johnson *v.* Bund, 1 Humph. 533; State *v.* Scoop. 7 Ind. 91; Southard *v.* Central R. R. Co., 2 Dutch. (N. J.) 13; Sprecher *v.* Wakely, 11 Wis. 432; Ib. 442; Knox *v.* Cleveland, 13 Wis. 245; McCarthy *v.* White, 21 Cal. 490; Baldro *v.* Talmie, 1 Oregon, 176; Price *v.* Hopkins, 13 Mich. 318; Cook *v.* Kendall, 13 Minn. 324; Lockhart *v.* Yiesser, 2 Bush, (Ky.) 231; Fish *v.* Briggs, 6 Rhode Island, 557; 67 Penn. St. 499; S. C., 5 Am. Rep. 450; 106 Mass. 572; 20 Iowa, 356; Wood *v.* Winnock, 3 N. H. 473; 4 N. H. 18; 6 Ib. 114; 32 Ib. 432; 33 Maine, 333.

This provision is in part a new one in Ohio. A similar one was enacted in England, and known as Lord Tenterden's case. 9 Geo. 4, chap. 14, sec. 1. It has received a construction in the English courts, as well as in the courts of New York. The first case that I will refer to is that of Turney *v.* Dodwell, 24 Eng. Law and Eq. 92. The action counted first on a promissory note for £108 15s., dated May 5, 1843; second, on a bill of exchange for £30, drawn on the 15th April, 1848. To the first count the statute of limitations was pleaded and issue taken thereon. On trial the facts were these: The defendant being indebted to the plaintiff, gave the note first declared on. In February, 1848, the defendant, who had been pressed to pay part of the debt, drew the bill for £30 and delivered it to the plaintiff. The question was raised whether the giving of this bill was a *payment* within the meaning of the statute; and the court held that it was. Lord Campbell, C. J.: "Before the statute of 9 Geo. 4, such a part payment was clearly sufficient to take the case out of the statute of limitations, as amounting to an acknowledgment of the balance being due; and the real question is, whether such payment by bill, though not received in absolute satisfaction, is not a payment within the proviso in that statute. The effect of giving a bill of exchange on account of a debt is laid down by Maule, J., in the recent case of Belshaw *v.* Bush, 11 Com. Pleas, 191; S. C., 14 Eng. Com. Law, 254, approving the doctrine of the common pleas in Griffiths *v.* Owen, 13 M. & W. 58, and of Alderson, B., in Jones *v.* Williams, 13 Mee. & W. 883. In all those authorities, such a delivery of a bill is laid down as a conditional payment. We do not see why its immediate operation, as an ac-

knowledgment of the balance of the demand being due, is at all affected by its operation as a payment being liable to be defeated at a future time. The statutes intending to make a distinction between mere acknowledgments by word of mouth, and acknowledgments proved by the act of payment, it surely can not be material whether such payment may afterward be avoided by the thing paid turning out to be worthless. The intention, and the act by which it is evinced, remains the same. We think that the word "payment" must be taken to be used by the legislature in a popular sense, and in a sense large enough to include the species of payment in question; and we should think the acknowledgment of liability as to the remainder of the debt not at all altered by the fact of the notes, by which it was paid, turning out to be forged, or of the coin turning out to be counterfeit. In all these cases, the force of the acknowledgment is the same, and the payment is, we think, a sufficient payment within the words of the 9 Geo. 4." Milford *v.* Duke of Argyle, 6 Man. & Gr. 40; Kearslake *v.* Morgan, 5 T. R. 678; Bishop *v.* Crowshay, 3 B. & Cr. 415.

In the case of Marienthal *v.* Mosler, 16 Ohio St. 566, the court held that a payment of a dividend by the assignee of an insolvent debtor is not such a part payment as will, under section 24 of the code, take the residue of the debt out of the statutory limitation as against the debtor. Day, J., in giving the opinion of the court, says: "No change is made in the effect of a part payment of a debt. It will be seen, however, that the same effect is given to such part payment as is given to "a written promise signed by the party to be charged therewith." It would seem, therefore, from analogy, that the payment must be made by the party to be affected thereby, or by an agent authorized for that express purpose. In contemplation of the statute, the part payment of a debt is regarded as a willingness and obligation to pay the residue, as conclusive as would be a personal written promise to that effect. It could not, then, have been intended to give this effect to payments other than those made by the party himself, or under his immediate direction. Surely, nothing short of this would warrant the assumption of a willingness to pay, equal to a written promise to that effect." *Vide* Stoddard *v.* Doan, 7 Gray, 387.

In the case of Picket *v.* Leonard, 34 N. Y. 175, the same question substantially was decided in the same way. In this case the defendant had made a voluntary assignment for the benefit of creditors, and the payment was made by the assignee, and the court held that such payment did not take the case out of the statute of

limitations. Hunt, J., says: "The decisions of this court in Winchell *v.* Hicks, 18 N. Y. 567; in Van Keuren *v.* Parmele, 2 Comst. 572; and Shoemaker *v.* Benedict, 1 Kern. 185, establish principles which will give great aid in disposing of the present case. In these cases, among others, the following propositions are established:

1. That payments by the debtor are evidence of an acknowledgment of the existence of the debt, and a willingness to pay it.

2. That such payment must be made by the party who is sought to be charged, or by some person acting by his authority.

3. That the existence of a joint indebtedness does not constitute an authority for one joint-debtor so to act in this respect for the other.

4. That where sureties requested their principal to make a payment, such payment bound them; but that they were not bound unless it was made by their request.

5. That upon the dissolution of a copartnership, one partner has no such authority as will enable him, by a promise or payment, to bind his copartner.

6. That whether such payment is made before or after the statute has attached, is immaterial.

Some light also can be obtained from a reference to the decision upon the acts of assignees of insolvents and bankrupts in this country and in England. Among such cases are Jackson *v.* Fairbanks, 2 H. Bl. 340; Blanchard *v.* Wharton, 1 Barn. & Ald. 220; Roscoe *v.* Hale, 7 Gray, 274; Roosevelt *v.* Mack, 6 Johns. Ch. 292; and Davis *v.* Edwards, 7 Exch. 22. The result of these cases at this time is this: that the payment by the assignee in bankruptcy or insolvency of a part of the debt, does not take the case out of the statute of limitations.

These cases last cited, and the reasonings upon them, afford a safe ground of decision in the present case. They proceed upon the basis that it would be unreasonable to construe payments by those who are not parties to the contract, nor under any personal obligation in respect to them, but are appointed to execute specific duties, as evidence of a willingness and intention by the original debtor to pay the entire debt; that it would be a perversion of the intention of the parties to make the simple execution of the trust by the assignees the ground of a new assumption of the debt by the debtor.

A voluntary assignment, like an assignment in bankruptcy, or under the insolvent laws, is made for a single specific purpose, by

means of the property assigned, to pay the debts to which it is appropriated. It has no other object or intent, near or remote; and no other idea can be honestly entertained by the parties. Even for this purpose the assignee can hardly be deemed the agent of the assignor, but certainly not beyond it. I do not see that he is in any respect more the agent of the assignor than is the assignee in bankruptcy or insolvency. The one is nominated by the debtor alone, the other by the debtor and creditors; but the mode of appointment does not decide the question of power or agency. He is neither authorized to speak nor act for the assignor, nor is the wish or direction of that party one which he is bound, or would be justified in obeying. His duty is pointed out by law, and he can not protect himself in any deviation from it by the instructions of the party. Dunham *v.* Waterman, 17 N. Y. 9, 18.

The acts of the assignee are beyond the control of the assignor. The assignor is not at liberty to accompany a payment, by the assignee, with qualifications or a disclaimer, as when made by himself. Such payments are made without his knowledge or assent. In his own action, he may make an express disclaimer of an intention to make a further promise, and limit the effect of the payment to the payment itself; while, on the theory presented, the act of his alleged agent is more comprehensive, and necessarily carries with it a future obligation. He has no power or opportunity to disclaim, and it would be fruitless to attempt it.

In McLaren *v.* McMartin, 36 N. Y. 88, it was held that a demand, barred by the statute of limitations before the adoption of the code, could not be revived by a subsequent acknowledgment, unless contained in a writing signed by the party to be charged, and that a partial payment by an executor or administrator on a demand already barred at the death of the testator, is not sufficient to revive it against the estate.

In Horseley *v.* Billingsley, 19 Ohio St. 413, the court held that causes of action subsisting when the code of civil procedure went into effect, are not affected by the provisions of section 24; and, therefore, verbal promises to pay, made subsequently to that date, and within the original statutory period of limitation, are sufficient to prevent the running of the statute in such cases. But this decision does not apply to a case already barred before the promise is made. The right of action, say the court, here accrued in 1840, and was *still subsisting* in 1853, when the code took effect. As under our statute the bar of the statute is an extinction of the debt (Hill

v. Henry, 17 Ohio, 8), after the code the new promise is a new cause of action, and must be in writing.

The payment of a dividend by the assignee of an insolvent debtor is not such part payment as will, under section 24 of the code, take the residue of the debt out of the statutory limitation as against the debtor.

CHAPTER IV.

PARTIES.

This title is full of confusion and uncertainty, growing out of the effort to provide for distinct classes of cases under the same language. It must be borne in mind, that the code provides for parties in cases at law, and also in equity. The rules which regulate the parties in the two classes are very distinct, and must be kept before the mind in any effort to educe sytem out of this title. This title, like many other parts of the code, first fixes positive rules as to the parties to a case, and then by a sweeping clause, leaves it to the discretion of the court to say who shall or shall not be necessary parties in a cause. We will first consider who must be plaintiffs, and then who may or may not be; and we will then pursue the same course as to defendants.

I. *Who must be Plaintiffs.*

The following are the sections of the code on this head:

Sec. 25. Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section 27.

Sec. 26. In the case of an assignment of a thing in action, the action by the assignee shall be without prejudice to any set-off or other defense *now* allowed; but this section shall not apply to negotiable bonds, promissory notes, or bills of exchange, transferred in good faith and upon good consideration before due.

Sec. 27. An executor, administrator, guardian, trustee of an express trust, a person with whom, or in whose name, a contract is made for the benefit of another, or a person expressly authorized by statute, may bring an action, without joining with him the person for whose benefit it is prosecuted; and official bonds may be

sued upon in the same way. This last clause is contrary to section 506. Bush *v.* Lathrop, 22 N. Y. 535; Stillwell *v.* Hurlburt, 18 N. Y. 374; People *v.* Norton, 5 Selden, 176; Meech *v.* Stoner, 19 N. Y. 26; Masury *v.* Southworth, 9 Ohio St. 340; Hunter *v.* Comm'rs, 10 Ohio St. 515; 2 West. Law Month. 474; Allen *v.* Miller, 11 Ohio St. 374.

The above are the sections relating to the person who must be the plaintiff. The real party in *interest* must be the plaintiff. Before undertaking to settle what this language means, we may as well ascertain to what classes of cases it does not apply.

1. It does not apply to executors, administrators, or guardians. The law as to these classes remains as it ever was, and needs no illustration.

2. Trustee of an express trust. It is somewhat difficult to define the exact meaning of these words. What is an express trust? Is it a trust created by written contract, or may it be proved by parol? Must the trust appear on the face of the contract, or may it be proved *aliunde* the contract? Suppose a note is made payable to A, while in fact it is made for the benefit of B. Can the written contract of the parties be varied by parol? Can the defendant defeat the right of A to recover, by showing that the money to be recovered really belongs to B? It would seem that in such cases there was an express trust, and that the *cestui que trust* need not be a party. He has a right in equity to sue both the trustee and the party indebted; the reason of this is, because he has a right to protect his own interest; but in such a case the trustee is a necessary party. In Grinnell *v.* Schmidt, 3 Code, 19; 2 Sand. S. C. 706, it was held that mercantile factors or agents doing business for others, but in their own names, were trustees of an express trust. It may be found necessary to limit this clause to trustees, in the strict technical sense of that term, since other clauses provide for numerous other implied trusts, and trusts to be proved by parol.

But this portion of section 27 has received a construction in the New York courts since the above was written. The first case to which I will refer is that of The People *v.* Norton, 9 N. Y. 176. In this case a bond from a trustee had been taken in the name of the people of the State of New York, for the benefit of those interested in the trust estate; and it was held that an action on the bond was properly brought in the name of the people, they being trustees of an express trust, within the meaning of this section. "The next question," says Ruggles, C. J., "is whether the bond can be prose-

cuted in the name of the people, or whether it must be sued in the names of those beneficially interested. According to the code of 1849 (section 111) every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section 113. By section 113, 'an executor or administrator, a trustee of an express trust, or a person authorized by statute, may sue without joining with him the persons for whose benefit the suit is prosecuted.' The plaintiffs in this case were trustees of an express trust within the meaning of section 113. The duty of holding the bond for the benefit of the children of Mary Lynch appears plainly by the recitals in the bond itself. Money collected on the bond in the name of the people, is collected for these children, and a court of equity directs it to be paid to them as a matter of course. This construction of the code of 1849 is confirmed by the code of 1851, in which, by an amendment to section 113, it is declared that 'a trustee of an express trust, within the meaning of that section, shall include a person with whom or in whose name a contract is made for the benefit of another.' The action, therefore, was rightly brought in the name of the people."

The next case is that of Considerant *v.* Brisbane, 22 N. Y. 389. The action in this case was brought on a promissory note, which reads as follows:

"$5,000. NEW YORK, *March* 1, 1855.

"On the first day of July, 1856, I promise to pay V. Considerant, as executive agent of the company, Bureau, Guillon, Godin & Co., the sum of five thousand dollars, for which I am to receive stock of said company, known as premium stock (actions a prime) to the amount of $5,000, value received. A. BRISBANE."

There was a second note of the same amount, and couched in the same words.

The plaintiff had acted for said company as its agent, and had caused the stock to be placed to the name of said defendant, in said company, which company was located at Brussels, Belgium, and the plaintiff had always been ready to deliver the certificates of said stock, and the defendant had neglected to pay said several sums of $5,000. A demurrer was interposed to this petition, because it did not state facts constituting a cause of action.

Wright, J.: "It is conceded, as it must be, that the complainant states a cause of action in the corporation, for whom the plaintiff acted as executive agent, against the defendant. The company,

and not the plaintiff, was the party beneficially interested; and the duty or obligation to issue the stock rested upon and could only be performed by such company. Had the company, on the 1st of July or the 1st of September, refused to issue the stock, no action could have been maintained by anybody on the instruments executed on March 1, 1855, by the defendant, and set out in the complaint. On the other hand, the defendant's remedy would be against the corporation, and not against the person professedly acting as its agent. Thus the corporation had the exclusive beneficial interest in the subject of the defendant's promises.

"The facts stated, therefore, in the complaint, showed the corporation and the defendant to be the parties in whom the interest in the contract vested; and the plaintiff, who made the contract, having no beneficial interest in it, nor bound by it, nor furnishing any part of the consideration for it, the single question is, whether the plaintiff may maintain an action for the breach of it.

"The code provides that 'every action must be prosecuted in the name of the real party in interest, except that an executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted.' Code, secs. 111, 113. And it is declared that a trustee of an express trust, within the meaning of the section, shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another. Sec. 113.

"It is plain that the plaintiff is not the real party in interest; but the question remains, is he a trustee of an express trust, within the definition of that term in section 113 of the code? Is he a person with whom or in whose name a contract is made for the benefit of another? As such, he would be authorized to sue on the subscription notes in his own name, notwithstanding the beneficial interest was in his principal. . . .

"Prior to the code, therefore, I am of opinion that the plaintiff might have maintained an action on the express contracts set out in the complaint, for the benefit of his principals, having a legal title in them by way of trust. The promise being to him in writing, for the benefit of another, he would have been deemed the party with whom or in whose name the contracts were made, and in whose name alone the promise could be enforced in a court of law. . . .

"It (the code) is intended, manifestly, to embrace, not only formal trusts, declared by deed *inter partes*, but all cases in which

a person, acting in behalf of a third party, enters into a written express contract with another, *either in his individual name, without description*, or in his own name, expressly in trust for or on behalf of, or for the benefit of another, by whatever form of expression such trust may be declared. It includes, not only a person with whom, but one in whose name a contract is made for the benefit of another. The contracts set out in the complaint are within its terms. They are made in the name of the plaintiff, for the benefit of the Belgian corporation. The subscription notes are payable to the plaintiff by name, as executive agent of principals named, and are, therefore, contracts made with him for the benefit of another, and in a representative capacity, necessarily involving a trust. The court below assumed the ground that, when the promisee, though named in the contract, was mentioned only in respect of his official or representative character, and not as promisee individually, the promise would not be deemed made to him; and hence such a case would not be embraced within section 113. This can not be the true construction of the statute. If the promise be to a person described as agent, and it appears upon the face of the writing, expressly or by implication, that it was made for the benefit of another, it is within the intention, and, I think, the terms of the enactment. It could hardly have been the intention, as contended for by counsel of the respondent, to include a contract which did not, on the face of it, in terms or by implication, declare or disclose a trust, in the category of express trusts, while one, expressing the trust on its face, was to be excluded. The obvious policy of the legislature was to reserve the right of action in all cases of express trusts, whether the instrument in terms declared the trust, or by necessary implication disclosed it. . . . Indeed, the terms 'executive agent' indicate an active trust. Had the subscription notes, on their face, been made payable to the plaintiff, 'in trust for the company,' etc., no one would doubt of their falling within the statute. In legal effect, the contracts as much involve a trust as though the same was declared in words.

"The court below reached the conclusion that, though the plaintiff's name was contained in the contract, it was accompanied by such a designation of the representative character in which he was named as promisee, that the promise was, in judgment of law, made to the principal, and not to himself; and that, in such cases, the contract could not be said to be made in his name. It is assumed that the written contract in this case was made, in legal effect, with the principals by the plaintiff, acting as their mere naked agent,

and, in a legal sense, can not be said to be made with or in the name of the plaintiff. It would follow, from such an assumption, that, neither before nor since the code, could the plaintiff sue thereon. This, however, is an incorrect view. Before the code, I think, the remedy at law, upon an express contract of this character, must have been enforced in the name of the plaintiff; but that, if there was any doubt upon this subject, the plaintiff clearly falls within that description of person who, by section 113 of the code, shall be construed to be 'a trustee of an express trust,' and, as such, authorized to sue. Since the adoption of the general rule that actions, either of a legal or equitable nature, must be prosecuted in the name of the real party in interest, the person for whose benefit the action was prosecuted might be joined with the trustee; but section 113 expressly authorizes suits to be maintained by the trustee alone.

"Upon the whole, I am of the opinion that the action may be prosecuted in the name of the plaintiff, and that the demurrer can not be sustained."

Denio, J., dissented from the judgment of the court; but, in his dissenting opinion, he admits the rule as stated by Wright, J. He says: "If this action had been prosecuted under the rule as to parties, which prevailed before the code of procedure was enacted, the question would have been, whether the contract was made with the plaintiff, as the promisee, or with the corporation mentioned in the complaint, by the plaintiff, as its agent. If the plaintiff was considered the contracting party, the action could be maintained in his name, though the corporation were the party beneficially interested; the rule, in actions *ex contractu*, being that the suit must be in the name of the party in whom the legal interest is vested, though the equitable interest should be in another person. The code, though adopting, as a general rule, the practice prevailing in courts of equity, by which the parties having the beneficial interest were required to be brought before the court, made an exception in favor of the trustees of express trusts, and in favor of parties with whom and in whose name contracts were made for the benefit of other persons. Such contractors, in order to include them within the words of the exception, were to be considered trustees of express trusts. The question to be determined is therefore precisely the same, which would have arisen, if there had been no code; namely, whether, in point of law, this contract was made by the defendant with Mr. Considerant, the plaintiff, or with the corporation named Bureau, Guillon, Godin & Co."

It will be seen that the whole court agree that, if the contract was made by the defendant with the plaintiff, then the plaintiff came within this provision of the code, and the action could only be prosecuted by him. It seems to me that Judge Denio overlooked the important words, "and *in the name of the person in whose name the contract was made.*" This contract was clearly made in the name of Mr. Considerant. There are here two classes of cases which come within this provision of the code: 1. When the contract is made by one for another; 2. When it is made in the name of one for another. Under the latter clause, the contract may be made by the real parties in interest; yet, if they draw up the contract in the name of another person, for the benefit of one of the parties, the action on that contract must be prosecuted in the name inserted in the contract. The other class is where one *makes* a contract, as an agent for another, in his own name, yet for the benefit of his principal. In this case, the action must be brought in his name, and not in that of his principal.

This question came up again in Nelson *v.* Eaton, 26 N. Y. 410. The court there held, that where an insurance company transferred to the plaintiffs, as trustees, a promissory note as a security for the liabilities of persons who had lent their credit to the company, with power to sell the note at public or private sale, without notice, the power to sell did not take away the power which the trustees took by the mere transfer of the note to sue upon it in their own names, without joining the *cestuis que trust.* The court went further, and said *it would seem* that, had the trust deed contained an express agreement not to sue, this would have been unavailable to the maker of the note, he having no interest in the trust. Selden, J., in delivering the opinion of the court, holds the following language: "The note constituted a perfect obligation against the defendant. He was bound to pay it to the person having the legal title to it. He was not interested in the trust, and the creation of it had no effect whatever upon his rights or duties. By the indorsement and transfer of the note to the plaintiffs, they obtained the legal title to it, and the right, the sole right, to demand and receive payment of it. The right of action to recover money attends upon the right to demand and receive it, and I think can not be severed from it. Flagg *v.* Munger, 5 Selden, 492. . . . The power of sale given to the plaintiffs by the trust contract was designed to give them an authority which, by the mere transfer of the notes to them as collateral security, they would not have had. I think it was not designed to take away any power, which the

transfer of the legal title to the notes gave them. But if such was the design, even if the instrument of trust had contained an express agreement on the part of the plaintiffs not to sue the notes, it would not have aided the defendant in this action. Having the legal title to the note, they had a perfect right of action against the defendant, and he could not avail himself of their covenant with strangers not to prosecute such action. Bank of Chenango *v.* Osgood, 4 Wend. 607–612. Such an action might be a breach of trust, but that would not aid the defendant—the trust in no way affecting either his rights or duties. The error in the judgment in this case has arisen from a failure to distinguish between the legal and the equitable interests in the note, which have no connection with each other. The legal interest depends upon the indorsement and transfer of the note by the insurance company to the plaintiffs; and in that alone has the defendant any interest. That transfer being perfect, the plaintiffs' right of action was perfect. The trust did not in any way affect it."

The same reasoning and logic will apply to the assignment of a non-negotiable instrument. The possession of the note gives the holder a *prima-facie* right to demand the payment of it, even though the same is neither indorsed nor negotiable. An absolute assignment of a non-negotiable interest vests all the equity in the assignee, and he alone has the right to demand payment or sue thereon. Any trust, then, in the assignee, not affecting the defendant, could not then be invoked by him to defeat the assignee's clear right to recover.

Our code speaks of *trustees of express trusts*, and of *the person with whom or in whose name* a contract is made for the benefit of another. These latter words in our code do not, as in the New York code, come under the words "trustees of an express trust." They stand affirmatively by themselves.

These cases show what is the meaning of the words "a person with whom or in whose name a contract is made for the benefit of another person." The trustee of an express trust will, under our statute, probably be limited to trusts as understood in a court of equity, while the above clause will embrace such cases as I have just cited from the New York decision. It would, therefore, appear to be the true doctrine that a contract in writing, made in the name of a named person, must always be sued in that name, though others may have the real interest in the contract. The parties have made their contract in a particular name, and not in the name of those interested, deliberately, and for a reason satisfactory to

themselves. To allow those in interest to sue on it, is to change the contract by making new plaintiffs, when the parties to the contract have vested the legal right in one for the benefit of another.

The same doctrine applies to notes, contracts, etc., indorsed or assigned to a named person, for the benefit of another. Here again the parties make their own contract, and the court must carry it out as made. The indorser or assignor has the exclusive right to say in whom the legal title shall vest, and, when so vested, the person named is the person in whose name a contract is made for the benefit of another. In all these cases, the facts come directly within these words, and the suit must be prosecuted in the name of the person in which it was made, to whom the defendant made the promise or agreement; nor has the defendant anything to do with the interests of the persons for whose benefit the contract was made. They are capable of asserting their own rights and protecting their own interests.

This doctrine does not prevent the parties in interest from going into equity to protect their interests and compel the trustee to carry out the confidence and trust reposed in him.

3. *A person with whom, or in whose name a contract is made for the benefit of another.* This clause almost nullifies the whole extent of section 25. Here the person with whom, or in whose name, the contract is made, may sue on the contract alone, This, of course, covers the great proportion of suits on contracts, and leaves the law just where it always has been, and where common sense would leave it, and where the contract of the parties placed the right to sue. Hence all suits on promissory notes, bills of exchange, and negotiable bonds, may be prosecuted in the name of the payee, or indorsee, without any regard to the person to whom the money may belong. The contract of the parties shall in all such cases govern. So it would seem that a suit on a non-negotiable instrument may be prosecuted as formerly in the name of the payee, though an equitable assignee may be entitled to the money. Unless such is the fact, then this single section has changed the whole law regulating negotiable instruments. That such was not the intention of the legislature is manifest from the fact that the law regulating negotiable instruments is left unrepealed.

4. A person expressly authorized by statute to sue need join no one else. This needs no explanation.

5. Officers may sue and be sued in such name as is authorized by law, and official bonds may be sued on in the same way.

It is said the exception proves the rule; here the exceptions emphatically annihilate the rule, or at least leave very few cases to which a rule so prompously stated can apply. To what cases can it then apply? It authorizes the *real party in interest* in all cases to do what he had in equity an undoubted right to do—to prosecute a suit against the person owing the debt or holding the property—and the party in whom the *legal* title to sue is vested, to enforce against both his equitable rights: while it leaves the party having the legal title to sue, to do it, it does not permit the defendant to defeat the action by showing an equitable title in another. Unless such a construction is given to the section, infinite confusion must ensue. May all choses in action be held to be legally assignable, so as to vest the legal title in a third person? If such had been the intention, why not say so openly, and do directly what would be done indirectly—repeal all laws regulating the negotiability of written instruments? Can it be possible that a right of action resting in parol, a right of action for seduction, or assault and battery, or slander, can be assigned so as to vest in the assignee a legal right to sue?

The question of the assignability of things in action has become an important one under the code, since the assignee can bring an action in his own name. Every cause of action which is in law assignable, can be sued on in the name of the assignee.

In Meech *v.* Stoner, 19 N. Y. 26, it was held that the right of action for money lost in gaming is assignable, and the action to recover back the money lost, could be brought in the name of the assignee. Comstock, J., speaking for the whole court, says: "The assignability of things in action is now the rule; non-assignability, the exception. And this exception is confined to wrongs done to the person, the reputation, or the feelings of the injured party, and to contracts of a purely personal nature, like promises to marry. The People *v.* Tioga Common Pleas, 19 Wend. 73; M'Kee *v.* Judd, 2 Kernan, 622." In this last case it was held that a right of action for the wrongful taking and conversion of personal property is assignable; and under the provisions of the code of procedure the assignee can recover upon the same in his own name. And if the demand is assignable, the action was properly brought in the name of the assignee, the plaintiff, who had the exclusive right to recover the damages for the purposes of the trusts. Code, secs. 111, 113. No demand or refusal was necessary to maintain the action. By the assignment the plaintiff succeeded to all the rights of the

assignor; this is a necessary consequence of the assignability of the claim, as distinguished from the property converted. 1 Selden, 344. The same doctrine is re-asserted in the case of Rightmeyer *v.* Remsen, 38 N. Y. 206.

In the case of Waldron *v.* Willard, 17 N. Y. 466, it was held that the claim for damages sustained by a freighter to goods in hands of a common carrier, was assignable, and the assignee could sue and recover the same in his own name. So also a claim for damages sustained to property by the negligence of one who had agreed to keep the canal in repair, is assignable, and the assignee can sue for and recover for these damages. The suit in this case was brought by an insurance company having a policy on the goods, which, after paying the loss, took an assignment from the insured for his claim, against the person bound to keep the canal in repair. Fulton Insurance Co. *v.* Baldwin, 37 N. Y. 648. The court say: "It is only necessary to state the action against the defendant in this case to show that it is assignable. The defendant, under his contract with the State to keep this section of the Erie canal in repair and free from obstructions, owed a duty to perform it, and which inured to the benefit of every citizen in the State who might have occasion to use this canal; and the defendant's neglect to remove this obstruction, in disregard of the duty which he owed to all who might be concerned in the navigation of the canal, rendered him liable in this action.

"The action is, in short, to recover for a *loss of property* sustained by the plaintiff's assignor, in consequence of the defendant's negligence in suffering the sunken canal-boat to impede the navigation of the canal, and endanger the property of those navigating the canal."

In Merill *v.* Grinnell, 30 N. Y. 594, it was ruled that a right of action against a common carrier to recover the value of property intrusted to him, is assignable; and the assignee may sue in his own name. In this case the property lost was the baggage of a passenger.

In Masury *v.* Southworth, 9 Ohio St. 340, the court held that the assignee of a reversion, having also assigned to him, by the terms of his contract of conveyance, the benefit of the covenants in a lease, might bring an action in his own name for a breach of such covenants, as the party beneficially interested, under the code of civil procedure, which in this respect supplies the statute 32 H. 8, cap. 34.

Gholson, J., said, in delivering the opinion of the court: "It has

been decided by this court that the statute of 32 H. 8, cap. 34, is not in force in this State, and that an assignee of the reversion can not maintain an action upon covenants in the lease. But if the covenant is assignable in equity, so that an action might have been maintained in the name of the assignor, or relief obtained by a suit in equity, our code of civil procedure operates upon the remedy, even more extensively than the statute of 32 H. 8, cap. 34. For whether the covenant be collateral, or inhere in the land, if it b assigned, the assignee not only may, but, as the party beneficially interested, must sue in his own name. For example, if there be a contract by a lessee to build a house or a road upon the land, at any time, and whether to be used by the lessee or not, the lessor, in selling the reversion, may also assign the benefit of such a contract, and the action of the assignee for a breach would, under the code, be in his own name."

In Hunter *v.* The Commissioners of Mercer County, 10 Ohio St. 515, the court held that in an action on a county treasurer's bond for taxes not paid over, the action can not be prosecuted in the name of the county commissioners, but must be prosecuted in the name of the State of Ohio.

In Allen *v.* Miller, 11 Ohio St. 374, 377, Brinkerhoff, J., holds the following language: "By the provisions of the code, the assignee of an account is its legal holder; his title is not a mere equitable title as before the adoption of the code, but a legal title. He holds it, not with the incidents of inviolability, which attach to commercial paper, it is true, but still as its legal holder, and as such is, *prima facie*, its proper representative as against the debtor."

The judge here assumes the fact to be proved; he refers to no section of the code, which declares any such doctrine as would change an *equitable* into a *legal* right. Before the code, the right of the assignee was an equitable one. The code nowhere changes this right; it merely says that the real party in interest shall bring the suit, and then merely says that the action by assignee shall be without prejudice to any set-off, or other defense *now* allowed. The law before the code, required the action to be in the name of the assignor, the holder of the legal title; and in saying the assignee may sue, it declares that the same set-off, or other defense, may be made against the assignee that could be made when the action was brought by the assignor for the use of the assignee. There is here not one word said of converting an equitable into a legal right; the code deals with an assignment as an assignment, leaving its character to be settled by the law in force, and not by the code. Be-

sides, the code is a code of *civil procedure;* it provides for the enforcement of rights, and nowhere assumes to change old rights or create new ones. This definition was designed to include equitable remedies and provide for parties to such actions as well as to actions founded on legal rights. This provision was the adoption of what was before the rule in equity. If the assignee went into equity, as he could, he was the complainant, and the debtor and assignor were the defendants. If this provision converts one equitable right into a legal one, why should it not convert all equitable rights into legal ones? If it has any such effect, that effect must apply to all equities. It is illogical to limit this effect to an account, or a note, and not apply it to other equities, where the *cestui que trust* must sue in his own name. The code simply provides *remedies* for *existing* rights; rights, whether legal or equitable, remain unaffected by the code.

The relation between the assignee of such equity and the debtor, is the same as between assignor and debtor. There can be no *bona fide* purchaser without notice of an equity; whereas, there could be, if the equitable right was converted into a legal one in the assignee. In Bush *v.* Lathrop, 22 N. Y. 535, the Court of Appeals held that the equities existing between the assignor and assignee of a chose in action not negotiable, attend the title transferred to a subsequent assignee for value without notice. The latter takes the exact position of his vendor. "All the cases," says Denio, J., "agree that the purchaser of a chose in action takes the interest purchased, subject to all the defenses, legal and equitable, of the debtor, who issued the security." All the cases equally agree that one purchasing of one having the legal title and taking that for a valuable consideration, without notice, is not subject to this rule. If the assignee of an account takes the legal title, he can transfer that legal title to a *bona fide* purchaser without notice, and he can enforce the collection of it, as much as the indorsee of a negotiable note *bona fide* and without notice. His right stands on the ground that he has acquired the legal title *bona fide* for value, without notice. If he took the note without indorsement, under similar circumstances, he could not enforce its collection against the makers having a defense; and the reason is, he has only an *equity* and not the legal title. It may be well to leave the rights of parties where the law left them before the code, instead of converting, through a misconstruction of the code, equitable rights into legal ones. The interest, therefore, of the assignee of a chose in action in the same is an *equitable* and not a legal interest, and the code simply enables

him generally to sue in his own name on such chose in action, averring an assignment for a valuable consideration to himself, and the case is to be tried and decided just as though the action had been brought in the name of the assignor for the use of the assignee.

The rule as to what is assignable is that the right of action is one arising out of a contract or transaction relating to rights of property, whether real or personal. Where the transaction is such that no injury to property has arisen out of it, like a promise to marry, assault and battery, injury on a railroad, false imprisonment, and the like, there is nothing to assign.

The title in regard to the abatement and survivors of actions shows that such can not be the case. Section 398 recognizes the common law as to the survivor of the causes of actions, and as to the abatement of them, with a slight modification. Section 399 declares that no action pending shall abate by the death of either or both the parties, except an action for libel, slander, etc. 2 S. & C. 1058. Here it is the parties to the action, whose death will not abate certain actions, except an action of slander, libel, malicious prosecution, assault, etc., which shall abate by the death of the defendant. If an action is not pending, then the common law applies, and the death of either party will prevent a suit. At common law all personal actions died with the party. Wilbur *v.* Gilmore, 21 Pick. 250. In actions *ex delicto*, where the wrong-doer acquired no gain, though the other party had suffered a loss, the death of *either* party destroyed the right of action. Middleton *v.* Robinson, 1 Bay, 58; Pitts *v.* Hale, 3 Mass. 321; Millen *v.* Baldwin, 4 Ib. 480; Stetson *v.* Kempton, 13 Ib. 272; McEvers *v.* Pitkin, 1 Root, 216; Franklin *v.* Low, 1 Johns. 396; Hambly *v.* Trott, Adm'r, Cowp. 372; Holmes *v.* Moore, 5 Pick. 257. Can it, therefore, be possible that the legislature intended to make negotiable a cause of action which must be extinguished even by the death of the assignor? The statute speaks of the death of the person entitled to such action as abating the same. Now, if it is negotiable, the death of the assignee after assignment would extinguish the right of action, as he would then be the person entitled to the action. This whole chapter goes upon the assumption that such rights of action are to be prosecuted in the name of the person injured. In Hodgman *v.* The Western Railroad Corporation, 7 Pr. 492, Harris, J., uses the following emphatic language: "At common law no mere right of action was so assignable as to pass the legal right to the assignee." The only change made by the code, in this respect, is to transfer, with the beneficial interest, the right of action also, in those cases

where before the court would recognize and protect the rights of the assignee. No new right of action is created; no authority is given to assign a right of action which before was not assignable.

When the right of action is of such a nature as not to be the subject of a contract, as in the case of a violation of personal or relative rights, it can not be assigned. The action can only be maintained by the party who has been injured, and when he dies, the right of action also dies. Every right of action involving life, health, or reputation, belongs to this class. So a right of action, founded upon the breach of a promise of marriage, being in its nature a personal injury, can not be transferred. On the other hand, where the injury affects the *estate* rather than the *person*, where the action is brought for damage to the *estate*, and not for personal suffering, the right of action may be bought and sold. Such a right of action upon the death, bankruptcy, or insolvency of the party injured, passes to the executor, or assignee, as a part of his assets; because it affects his estate, and not his personal or relative rights. Of course, such a right of action is assignable, and, under the provisions of the code, the assignee is the proper party to maintain the action upon it. The People *v.* Tioga Com. Pleas, 19 Wend. 73; 1 Chitty's Pl. 68; Chamberlain *v.* Williamson, 2 M. & S. 408; Robinson *v.* Weeks, 6 Pr. 161; Flynn *v.* The Hudson River R. R. Co., 6 Ib. 308; Comegys *v.* Vasse, 1 Peters, 213. In the latter case, Story, J., says: "In general, it may be affirmed that mere personal *torts*, which die with the party and do not survive to his personal representatives, are not capable of passing by assignment; and that vested rights *ad rem* and *in re*, possibilities coupled with an interest, and claims growing out of and adhering to property, may pass by assignment." Hence it was held that a right of action for injuries suffered by one on a railroad could not be assigned, so as to enable the assignee to sue in his own name. Ibid.

It would seem from what has been said, that the *real party* in interest refers rather to choses in action, which have been assigned, than to actions between the original parties to contracts. In these cases the action, if founded on legal principles, must be brought in the name of the party to whom the promise is made, or the obligation assumed. The language, "the person in whose name a contract is made for the benefit of another," embraces every contract not made for the benefit of the party himself. Every contract must be for the benefit of the person in whose name it is made, or for the benefit of a third person: if made for his own benefit, then all agree the action must be in his own name; and if made in his

name for the benefit of another, then the suit must at law be in his name, because the code so declares.

The most difficult question arises where there have been assignments. The cases already cited show that an assignment in writing to a named person for the use of others vests the title in the assignee, and that he must sue to recover the amount claimed to be due thereon.

There is another class of cases where the assignment is made in writing, and the assignee agrees to collect and retain part, and pay the balance over to assignor or to others. In this class of cases the action must be brought in the name of the assignee, he holding the legal or equitable title and being authorized to collect; his liability to others being personal and not attaching to the chose in action itself.

In Commings *v.* Morris, 25 N. Y. 625, it was held that the indorsee of a note, for a consideration not to be paid till the note should be collected, is the real party in interest to maintain an action thereon. In this case the note was transferred by the payee for the benefit of his family. The opinion of the court was delivered by Allen, J. "By the statute," he says, "every action must now be prosecuted in the name of the real party in interest, except in the few cases of trust and representation excepted by law. Code, sec. 111. The object of this provision was to abolish the distinction between the former practice of courts of common law and chancery, and give full effect at law as well as in equity to assignments of rights in action by permitting and requiring the assignee to sue in his own name. If, as between the assignor and assignee, the transfer is complete, so that the former is divested of all control and right to the cause of action, and the latter is entitled to control it and receive its fruits, the assignee is the real party in interest, whether the assignment was with or without consideration, and notwithstanding the assignee may have taken it, subject to all equities between the assignor and third persons. The consideration and circumstances of the transfer may be important with a view to settle the equities and establish the rights of others; but if it is absolute as between the immediate parties to it, the assignor not only may, but must bring the action in his own name. The consideration was ample, and it does not affect the transaction that it was not to be paid until the notes should be collected, and it may be its payment was conditional, depending upon that contingency. But the notes became the the property of the plaintiff although his liability to pay them was contingent. . . . The

plaintiff may receive and appropriate the money that may be collected on them to his own use. This gives him the legal title and makes him the proper party plaintiff." Selden *v.* Pugh, 17 Barb. 468; Hastings *v.* McCurdy, 1 E. D. Smith, 273; James *v.* Chalmers, 2 Selden, 209; Ross *v.* Bedell, 5 Denio, 467.

This section came again under consideration in the case of Allen *v.* Brown, 44 N. Y. 228. It was there held that an assignee of a chose in action, holding the legal title by written assignment, valid upon its face, is the real party in interest under section 111 of the code of procedure, although others may have an ultimate beneficial interest in the proceeds, and even if he would be liable as their debtor, under his contract with them, for the amount realized. The claim in this case arose out of the following facts: Cook, Carey & Clark had certain claims against a western railroad; the defendant had also. The defendant took the claim of C., C. & C. to collect; he did collect same, but had not paid over certain moneys received by him on certain notes he had taken on settlements. C., C. & C. assigned all their interest in the demand to the plaintiff, who commenced this action. The claim, therefore, was an unliquidated demand not evidenced by any note in writing. It was a non-negotiable demand. Allen paid nothing, and if he got beat, he was to pay nothing.

Hunt, C.: "The code abolishes the distinction between actions at law and suits in equity, and between the forms of such actions. It is also provided in section 111 that every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section 113. . . . These provisions are intended to abolish the common-law rule, which prohibited an action at law otherwise than in the name of the original obligee or covenantee, although he had transferred all his interest in the bond or covenant to another. It accomplishes fully that object, although others than the assignee may have an ultimate beneficial interest in the recovery. In a case like the present, the whole title passes to the assignee, and he is legally the real party in interest, although others may have a claim upon him for a portion of the proceeds. The specific claim and all of it belongs to him. Even if he is liable to another as a debtor upon his contract for the collection he may thus make, it does not alter the case. The title to the specific claim is his." Durgin *v.* Ireland, 4 Kernan, 322; Williams *v.* Brown, 2 Keys, 486, and the case cited; Paddon *v.* Williams, 1 Rob. 340; S. C., 2 Ab. N. S. 88.

Leonard, Comm'r, also said: "It is urged that there was no consideration for the assignment of Cook, Clark & Carey to the plaintiff. It was in writing, signed by the parties, and purported to be for value received. The assignors transferred their interest, and the plaintiff became thereby the real owner. Any judgment recovered by him bars the claims of the assignors and protects the defendant. Being a chose in action, the transfer does not preclude the defendant from interposing any defense which he could have made against the assignors, had the action been brought by them. The execution of the assignment complies with the requirement of the code, and makes the plaintiff the real party in interest. Sec. 111."

The same doctrine was re-asserted in the case of Mecker *v.* Claghorn, 44 N. Y. 349. The court held that the assignee of a cause of action by absolute assignment in writing is the real party in interest within section 111 of the code, notwithstanding it may appear that the assignor expects to get the money, if it is recovered in the action. The claim in this case was an open account for ironwork delivered by the assignors to the defendant.

In Williams *v.* Brown, 2 Keys, 486, Hunt, J., says: "If the holder of a promissory note is legally in its possession, and is entitled to receive its payment, we have repeatedly held that he is the proper plaintiff in its prosecution, and this without reference to who may ultimately be entitled to a participation in its proceeds." Hunt *v.* O'Connor, not reported; Ross *v.* Black, not reported.

These cases settle the true construction of these sections. The debtor has no interest in the transfer; nor can he inquire into the motive or consideration for the assignment; that is a matter in which he has no interest. If the assignor chooses to assign a chose in action out of love and affection, or as a gift, what right has the defendant to inquire into that fact? If the assignment is absolute, the assignee is substituted for the assignor in the action and can prosecute the action thereon in his own name. The debtor has nothing to do with trusts, or other considerations or promises attending the assignment; all he has a right or an interest to inquire into, is as to the fact of the assignment, as to whether the assignor has vested in the assignee all the rights he had to demand the money. Any other construction of the code would lead to endless conflicts and litigation between the assignee and the debtor. Besides, any such construction would put an end to all assignments, where there was any arrangement connected with it whereby the

assignor or others might have a claim in the money when collected. There could be no assignment unless the assignee took both the equitable interest in the claim and the absolute right to the money when collected.

There is another case that may be cited, that of Whitman *v.* Keith, 18 Ohio St. 134. In this case it was held that the assignees of a judgment rendered in a case, where an attachment had been issued and parties garnisheed, might maintain an action against the garnishee under the provisions of section 218 of the code. The court say: "This right of action against the garnishee, given by section 218 of the code, was intended as a means of procuring satisfaction of the attaching creditor's claim. It is incidental to and inseparable from the ownership of such claim, and by the assignment of the claim passes to the assignee."

The survivor of a partnership is the real party in interest, and *the* action on partnership claims must be prosecuted in his name; the administrator or executor of a deceased partner can not be joined with him. Duby *v.* Ericsson, 45 N. Y. 786.

The doctrine was carried to a great length in Hall *v.* Plaine, 14 Ohio St. 417. In that case, Ebert, on the 24th February, 1854, bought of Plaine in his own name a tract of land, but in trust for Hall, the plaintiff, and took a deed therefor in his (Ebert's) name, containing the general covenants. Ebert afterward conveyed the land to Hall; at the time the deed was made, the lot was incumbered by two outstanding leases executed by Plaine. Hall brought suit on the covenant in the deed against incumbrances. The question was, could Hall under these circumstances, without an assignment from Ebert, maintain the action; and the court held he could. Wilder, J., delivered the opinion of the court. He says: "The objection here is that there is no averment of the assignment of the broken covenant by Ebert to Hall. But it is only a fair construction of the above allegations that Ebert was the agent of Hall in making the purchase; that he received the title in trust for Hall; and that, by the arrangements of the 3d March, 1854, he transferred to Hall, not merely the legal title, but all the interest he acquired from Plaine. The beneficial interest and equitable title was in Hall from the beginning. Before the code, Hall could have sued on the covenant in the name of Ebert for his (Hall's) use. Hall would have been entitled to the damages recovered, because he was the party, and not Ebert, by whom the damages were sustained. Since the code that form of procedure is not required. Section 25 of the code provides that every action must be prose-

cuted in the name of the real party in interest, except as otherwise provided in section 27. This language is mandatory. In section 27 it is permissive: 'An executor, administrator, guardian, trustee of an express trust, a person with whom or in whose name a contract is made for the benefit of another, or a person expressly authorized by statute, may bring an action without joining with him the person for whose benefit it is prosecuted.' Although under this section an action might have been brought by Ebert, in his own name, as the person in whose name the contract was made, yet this is not required. Ebert is a party defendant, and Hall is the real party in interest. The pleadings, therefore, show that the claim is well prosecuted in the name of Hall."

Such is the opinion of the judge; but the syllabus, which is drawn up by the court, and said to be only what the court is responsible for, is in these words: "When lands have been purchased by one and conveyed to him for the benefit of another, the deed of conveyance containing covenants of seizin against incumbrances and general warranty, which covenants are broken at the time of the execution of the deed, and the party for whom the purchase and conveyance were made subsequently obtains a conveyance of the land from his agent and trustee, such party may maintain an action in his own name, under the code, on the broken covenants, although such covenants did not pass to him by the mere conveyance of the land, or have not in terms been assigned to him."

The judge puts the case on the ground that the pleadings show that the claim is not prosecuted in the name of Hall, while the syllabus says that Hall may maintain the action. The action was strictly a bill in chancery under the old practice, when the *cestui que trust* sues the trustee, here Ebert, who held the title for him and the warrantor in the deed, asking that the damages might be paid to him, as in equity they belonged to him. On this ground the decision is correct, but on any other it is very debatable. There was here no assignment of the covenant against incumbrances by Ebert to Hall, which covenant was broken when the deed was made and delivered, as the incumbrances then existed. Here was then a right of action in Ebert, which the conveyance of the land did not assign, nor was there a specific assignment of it; it was a case then of a contract made in the name of Ebert for the benefit of Hall, on which the courts in New York hold no one but Ebert could sue. But the equitable right of a *cestui que trust* to sue in equity his trustee and the party holding his equitable interest, is not taken away by the code; and of that character was this action

of Hall *v.* Plaine and Ebert. On that ground the decision has law to support it, but it can not be supported on any other. The decision was right, but the reasons were bad.

It would seem, therefore, that this section must be limited to those cases where, heretofore, a court of law would protect the interest of an assignee, or where an assignee might maintain a bill in chancery to enforce his rights against the assignor and the creditor. Hence it does not apply to cases where the assignee acquires the legal title, as in the case of indorsees. Nor can it apply to real estate. There the holder of the legal title is entitled to recover, and the defendant can not defeat that right by showing an outstanding equity in another. That is a matter which only the holder of the equity has a right to enforce, and he has that right only as against the holder of the legal title.

There is another question growing out of this section. Is the assignor a necessary party? It would seem that he is; otherwise the defendant might have to pay the claim twice, since the assignor would not be bound by a judgment to which he was no party. And such seems to be the opinion in New York, as expressed in one case. The fact of the assignment is a fact in which the assignor has an interest. Where the law directs the mode and means of passing the legal title to property, there the grantors are not necessary parties; the plaintiff must prove his title by the legal evidence; but where there is no such legal evidence, there the assignor ought to be before the court in order to protect the defendant from a second recovery, in case no assignment should have been made.

This question came before the district court in Athens county, at its September term, A. D. 1858, in the case of Arms *v.* Cooper. The case was a petition in error, setting forth for error that the subject of action was an account, and the assignee had not made the assignor a party. The court—Nash, Peck, and Whitman, JJ.—held that the assignor was a necessary party. The section 25 of the code provides that the action must be prosecuted in the name of the *real party in interest;* this provision requires that in a case like the present the assignee must prosecute the suit in his own name, he being the real party in interest, since the money, when collected, is coming to him; but this construction of section 25 does not settle the question here presented; it simply settles that the assignor can not be the plaintiff in the action. The question, whether he is not a necessary *party*, still remains unanswered.

Whether he is, or is not, a necessary party will depend upon a proper construction of section 35.

Section 35 is in these words: "Any person may be made a defendant, who has, or claims, an interest in the controversy adverse to the plaintiff, or who is a necesssry party to a complete determination or settlement of the question involved therein." In this action there were *two* questions involved: *first*, the truth of the account, and *second*, the truth of the assignment. To a complete determination or settlement of the first question, the assignor is a necessary party; because, unless he is a party, the finding of the assignment will not protect the defendant nor conclude the assignor. If the assignor denies the assignment, he can sue the debtor; and the debtor must then prove the assignment of the account in order to protect himself against a second recovery. The defendant has a right to have himself protected against such a contingency, and this can only be done, by requiring the assignor to be made a party defendant in the action, by which the possibility of injury to him is avoided without inconvenience or injury to the plaintiff. By this mode of proceeding, the rights of all the parties will be protected and concluded; the truth of the assignment will be conclusively settled and determined as well as the truth of the account; any other construction of the code will leave both of the questions undetermined so far as the rights of the assignor are concerned; unless then the assignor is made a defendant, there can not be a complete determination and settlement of the questions involved in the action. The judgment was therefore reversed, and the cause remanded for further proceedings.

This question came under consideration of our Supreme Court in the case of Allen *v.* Miller, 11 Ohio St. 374. The syllabus does not, however, notice this point; but Brinkerhoff, J., in his opinion does. The judge assumes that the assignee of a chose in action is the legal owner of the thing assigned, and that the interest of the assignor and assignee is identical. In both these positions, I think the judge is wrong. I have already discussed the question as to the title of the assignee of a chose in action: it was an equity before the code, and it must be since; as the code does not assume to change or create rights, nor is the interest of assignee and assignor identical. The assignee claims to hold the claim adversely to the original right of the assignor, and he must aver such an assignment from the holder of the legal title. The claim of the assignee is adverse to the claim of the assignor; hence when a bill in chancery was filed before the code by the assignee of a chose in

action, the assignee was complainant, and the assignor and obligor defendants. The assumption of the judge is that every assignment set up by an assignee is true, and can not be disputed. Is this true? Has not the assignor a right to be heard on that question before his rights shall be concluded? and the rights of an assignor can not be concluded by a decision in a suit to which he was no party. It is then clear that the assignor has an interest adverse to the assignee, as well as the payer of the chose in action. The assignor has the legal title, the assignee an equitable one, and the payer has a right to have this contention settled so as to protect him, before he can be compelled to pay the equitable claimant to the thing assigned. It is not true, then, that the assignor should have been a plaintiff; he should have been a defendant, as he was in a bill in chancery by the assignee of a chose in action. I submit that the *dicta* in this case are not law, and that the question is open for further consideration.

II. *As to the Number of Plaintiffs.*

Sec. 36. Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of one who should have joined as plaintiff can not be obtained, he may be made a defendant, the reason being stated in a petition. 2 S. & C. 956.

Sec. 40. When the determination of the controversy can not be had without the presence of other parties, the court must order them to be brought in. 2 S. & C. 956; Burgoyne *v.* Trust Co., 5 Ohio St. 586; Coolidge *v.* Parris, 8 Ohio St. 594; Slanker *v.* Beardsley, 9 Ohio St. 589; Rutledge *v.* Corbin, 10 Ohio St. 478; Haskins *v.* Alcott, 13 Ohio St. 210, as to suits in firm name.

These sections do not seem to change the common law as to plaintiffs. All persons, holding the legal right to sue, must join as plaintiffs; if not joined, it will be ground for a plea in abatement, or a demurrer, if the fact appear on the face of the petition. The right to make one, who ought to have been a plaintiff, a defendant, must be applied to cases where there is a several interest in the same property, and can not be applied to joint contractors suing on a legal claim. In such cases, each party has the right to use the names of all to enforce even his own rights. This right must be limited to such cases as would have justified a person in going into a court of equity to compel a co-contractor, or a copartner, to aid in collecting a debt. To extend it to a common-law action, triable

by a jury, would introduce innumerable issues and interminable confusion. The dispute between the plaintiffs would be a controversy in equity, with which the defendant would have nothing to do, and in which the parties would have no right to involve him.

The code has to provide for parties in actions depending, not only on *legal*, but upon *equitable* rights; the language, therefore, which is broad enough for the latter, must be too broad for the former. Hence it must be construed with reference to the character of *right* sought to be enforced: if the right is a *legal* right of action, then all persons jointly interested in that *legal* right must be joined as plaintiffs; if the right is an *equitable* one, then all persons jointly interested in that *equitable* right must be plaintiffs. This rule will apply in all cases of a legal character, and in some of an equitable one.

But there is a distinction to be noticed. Equitable rights are very often rights inherent in particular property. It is a proceeding *ad rem*, while legal proceedings are *in personam*. Where the case relates to particular property, whether real or personal, there all persons interested in the disposition of that property are necessary parties. The court undertakes to convey or sell the title to the property, and it wishes to make a clear title to the purchaser at a judicial sale; hence every person who has a right in such property, must be before the court; and his right must be adjudicated upon and adjusted in the distribution of the proceeds of the funds or property. But this rule is limited to cases where the court is asked to dispose of property, or of a fund in dispute: in such cases the court undertakes to convey a title to property, and hence all having any title or interest in that fund or property must be before the court; but where the dispute or controversy is a dispute or controversy between two persons, as to their own title or rights to the property, there no other need be parties; because a settlement of their dispute can not affect any purchaser, since the court orders no sale—nor can it affect the rights of others. For instance: A claims that B sold him a tract of land, and asks that he convey. This dispute is confined to A and B; nor can B defeat the action by proving that he had no title. He must execute his contract, if A requires it, leaving the rights of others to be asserted when they see fit. So a suit to recover specific property merely settles which of the parties has the better right; it affects the rights of no other person, and hence no other person is either a necessary or even a permissible party.

It will thus be seen that the code substantially recognizes the old law as to parties. As to cases founded on purely legal rights, Chitty's Pleading must still be consulted as much as ever, and as to cases founded on equitable rights, Calvert on Parties in Equity is just as important as ever; and each must be thoroughly mastered by the legal student, if he ever expects to practice understandingly.

The Court of Appeals in New York, in the case of Duby *v.* Ericsson, 45 N. Y. 786, held that the survivor of a partnership could assign a partnership claim, and if suit is brought, it was to be brought in his name. The court say that the survivor of a firm is the real party in interest to a demand owned by or due to the firm. The debtor can not, when sued by the survivor, object that the representatives of the deceased partner are not made parties with the survivor. Their equity is to have an accounting and adjustment of the affairs of the partnership, and they have no specific interest in the debt sued upon, but in a residuum, which is uncertain and contingent. The test is, was the demand at the time of the death of the copartner a copartnership demand? If it was, the survivor takes the legal title with its incidents, however limited his equitable interest may be, and notwithstanding, on an accounting, nothing might remain to him. Clark *v.* Howe, 23 Maine, 560.

Where there was an undertaking given in four attachment suits levied upon the same property, which undertaking was to plaintiffs in the four suits, and afterward a fifth suit and attachment was instituted, the court held that the persons named in the undertaking and the subsequent attaching creditors might join in a suit on said undertaking, against the obligors thereof. The court say: "The undertaking being to the first attaching creditors for the forthcoming of the property or its value, the undertaking inured to the benefit of subsequent attaching creditors upon the same property, which was constructively in the hands of the sheriff; and such subsequent attaching creditors, although not named parties in the undertaking as payees, had a beneficial interest in the undertaking, being, in their order, respectively entitled to the fruits of the undertaking, the proceeds of the property on its sale, or of its value so secured by the undertaking.

"It therefore follows that the subsequent attaching creditors had an interest in the subject of the action, and in obtaining the relief demanded by the action upon the undertaking, and might properly be joined as plaintiffs."

Where there were two firms, in each of which one person was a member of both firms, the Court of Appeals in New York, in the case of Cole and others *v.* Reynolds et al., 18 N. Y. 74, held that an action in equity might be prosecuted by the members of one of the firms, not partners in the other, against all the members of the other firm, including the one that was their partner, and an account would be taken between the two firms, if necessary, to ascertain the amount due from the one firm to the other. In delivering the opinion of the court, Harris, J., said: "The defendants' firm are indebted to the plaintiffs' firm upon account stated and settled between them. This fact, standing alone, would entitle the plaintiffs to maintain an action at law. But there is another fact in the case, which, upon a technical rule peculiar to the common law, would have defeated such action. One of the individuals composing the plaintiffs' firm is also a member of the defendants' firm. A man can not sue himself; and as, at common law, all the members of a firm must unite in bringing an action, it follows that, in such a case, no action at law could be sustained.

"But, in equity, this technicality does not stand in the way of justice. It is enough there that the proper parties are before the court. They may be plaintiffs or defendants, according to circumstances, but, being before the court, it will proceed to pronounce such judgment as the facts of the case require. This latter rule is obviously the dictate of common law. So far as I know, it prevails everywhere else except at common law."

We have in Ohio a statute which authorizes copartnerships formed to do business in this State to sue and be sued in the partnership name. Companies suing in their firm name must aver that it is a company formed to do business in this State. A failure to make this averment is ground for a demurrer under the second subdivision of section 87 of the code. Haskins *v.* Alcott & Horton, 13 Ohio St. 210.

Representation.

SEC. 37. Where the question is one of common or general interest of many persons, or where the parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all. (2 S. & C. 957.) Roosevelt *v.* Draper, 23 N. Y. 327.

This is merely the copy of a rule long recognized in equity, and hence must be limited to such cases under the code. Calvert on Parties in Equity, 19. In these cases, one or more is authorized to

proceed on behalf of himself and others, in which they have a common interest. One creditor is authorized to file a bill against the personal representative of a decedent, to settle up the estate, and procure distribution. So where a matter is necessarily injurious to a common right, the majority of the persons interested can neither excuse the wrong, nor deprive all other parties of their remedy by suit. A portion of the parishioners, on behalf of themselves and all other parishioners, was permitted to file a bill to correct certain misconduct in managing a common allotment; and this, though the majority acquiesced in the wrong. Bromley *v.* Smith, 1 Sim. 9; Calvert on Parties in Equity, 35. So, also, one shareholder of a canal, on behalf of himself and the other shareholders, filed a bill to set aside an agreement made by the commissioners of the canal. Gray *v.* Chaplin, 2 S. & S. 272, *vide* also Jones *v.* Garcia del Rio, 1 T. & R. 297; Newton *v.* Egmont, 5 Sim. 137; Pearson *v.* Belcher, 4 Ves. 627; Good *v.* Blewit, 13 Ves. 397; Long *v.* Younge, 2 Sim. 386.

The number of persons must be large to justify a few in appearing for all. Calvert on Parties in Equity, 39. And the plaintiff must appear on behalf of all who are interested, else make those on whose behalf he does not appear, defendants.

So a part of those interested may be made defendants, and called upon, as a portion of a large number interested in the same question, to defend; so many must be sued as will insure a fair decision of the legal right. There must be several defendants; one will not be enough. Calvert on Parties in Equity, 42; Adair *v.* New River Co., 11 Ves. 444; Mayor of York *v.* Pilkinton, 1 Atk. 284.

A complaint which states that B, who has an interest in common with persons whom it would be impracticable to bring before the court on account of their great number and who sues for the benefit of the whole, complains, etc., is sufficient. Sourse *v.* Marshall, 23 Ind. 194.

But the right of a few to represent the whole is by no means confined to the instances of creditors and legatees (6 Ves. 779); and the necessity of the case has induced the court, especially of late years, frequently to depart from the general rule, in cases where a strict adherence to it would probably amount to a denial of justice, and allow a few persons to sue on behalf of great numbers having the same interest. Loyd *v.* Loaring, 6 Cumner's Ves. 773; Willis *v.* Henderson, 4 Scam. 20; Wendell *v.* Van Ransselaer, 1 Johns. Ch. 349; Hallett *v.* Hallett, 2 Paige, 18–20; Story Eq. Pl., sec. 94. Thus part of the proprietors of a trading undertaking,

where the shares had been split or divided into eight hundred, were permitted to maintain a suit on behalf of themselves and others, for an account against some of their copartners, without bringing the whole before the court (Chancey *v.* May, Prec. Ch. 592), because it would have been impracticable to make them all parties by name, and there would be continual abatement by death and otherwise, and no coming at justice, if they were to be made parties; and so where all the inhabitants of a parish had rights of common under a trust, a suit by one on behalf of himself and the other inhabitants was admitted (Blackham *v.* The Warden and Society of Sutton Coldfield, 1 Ch. Cas. 269); and one owner of lands in a township has been permitted to sue on behalf of himself and others to establish a contributory modus for all lands there. Chaytor *v.* Trinity College, 3 Anst. 841. Upon the same principle a bill was allowed by the captain of a privateer on behalf of himself and of all others, the mariners and persons who had signed certain articles of agreement with the owners, for an account and distribution of the prizes made by the ship. Good *v.* Blewitt, 13 Ves. 397; West *v.* Randall, 2 Mason, 193, 194. And in Lloyd *v.* Loaring, 6 Ves 773, Lord Eldon held that some of the members of a lodge of Freemasons, or of one of the inns of court, or of any other numerous body of persons, might sustain a suit on behalf of themselves and others for the delivery up of a chattel in which they were all interested. Cockburn *v.* Thompson, 16 Ves. 321.

It is, moreover, generally necessary, in order to enable a plaintiff to sue on behalf of himself and others who stand in the same relation with him to the subject of the suit, that it should appear that the relief sought by him is beneficial to those whom he undertakes to represent. Gray *v.* Chaplin, 2 S. & S. 267; Attorney-General *v.* Heelis, 2 S. & S. 77; Bainbridge *v.* Burton, 2 Beav. 539; Hallett *v.* Hallett, 2 Paige, 15; Story Eq. Pl., sec. 130, *et seq.*, secs. 79, 94. And where it does not appear that all the persons intended to be represented are necessarily interested in obtaining the relief sought, such a suit can not be maintained. Van Sandau *v.* Moore, 1 Rus. 465. Thus where a plaintiff, being one of the subscribers to a loan of money to a foreign state, filed a bill on behalf of himself and all other subscribers to that loan, to rescind the contracts of subscription, and to have the subscription moneys returned, Lord Eldon held that the plaintiff was not entitled in that case to represent all the other subscribers, because it did not necessarily follow that every subscriber should, like him, wish to retire from the speculation, and every individual must, in that respect, judge

for himself. Jones *v.* Del Rio, 1 Turn. 297. And upon the same principle, one of the inhabitants of a district, who claimed a right to be served with water by a public company, can not file a bill on behalf of himself and the other inhabitants, to compel that company to supply water to the district upon particular terms, because what might be reasonable with respect to one might not be so with regard to the other. Weale *v.* West Middlesex Water Works, 1 J. & W. 370; Beaumont *v.* Meredith, 3 V. & B. 181. Where, however, it is perfectly clear that the object of the suit is for the benefit of all the parties interested, a few may maintain a bill on behalf of themselves and others, even though the majority disapprove of the institution of the suit. Momley *v.* Smith, 1 Sim. 8. Upon the same principle, in Small *v.* Attwood, 1 Younge, 407, a few shareholders of a joint-stock company were permitted to maintain a suit on behalf of themselves and other shareholders, for the purpose of rescinding a contract, it being manifest from the evidence that it was for the benefit of all the shareholders that the contract should be rescinded. Walworth *v.* Holt, 4 M. & C. 635; Taylor *v.* Salmon, 4 Myl. & Cr. 134. It does not appear, moreover, that the fact of a company being incorporated by act of Parliament, necessarily prevents individual members of the corporation suing on behalf of themselves and the other members of the company. Foss *v.* Harbottle, 2 Hare, 491; Preston *v.* Grand Collyer Dock Co., 11 Sim. 1; Leigh *v.* Thomas, 2 Ves. 312; Baldwin *v.* Lawrence, 2 S. & S. 18; Hales *v.* Pomfret, Daniel Ex. 142; 1 Daniel Ch. Pr. 286.

Walworth, Ch., in Hallett *v.* Hallett, 2 Paige, 15–18, uses the following language on the subject: "Who are necessary parties to a suit, is frequently a question of difficulty; and it is impossible to reconcile all the various decisions on this subject either with established principles or with each other. But there are certain general rules which must serve as a guide to the court on a subject that in some measure depends upon the exercise of a sound discretion. It is a general rule in equity that all persons materially interested in the subject matter of the suit, either as complainants or defendants, ought to be made parties, in order that a complete decree may be made, which will bind the rights of all, and prevent a useless multiplication of suits. But to this rule there are many exceptions. It is a rule adopted for the convenient administration of justice, and is dispensed with when it becomes extremely difficult or inconvenient. Wendell *v.* Van Renssellaer, 1 Johns. Ch. 349. It is on the principle of this exception that the circuit courts of the United States,

which are courts of limited jurisdiction with regard to parties, are enabled to exercise equity jurisdiction in many cases, when a strict adherence to the rule would compel the complainants to resort to the State courts. Elmendorf *v.* Taylor, 10 Wheat. 152; Harding *v.* Handy, 11 Wheat. 103. But this exception does not extend to those cases, where the rights of persons not before the court are so inseparably connected with the claims of the parties litigant, that no decree can be made without materially affecting the rights of the former. Mallow *v.* Hinde, 12 Wheat. 193; Ward *v.* Arredonds, 1 Paine, 410; 1 Hopkins, 213, S. C. If there are many parties standing in the same situation, as to their rights and claims upon a particular fund, and where the shares of a part can not be determined until the rights of all the others are settled or ascertained, as in cases of creditors of an insolvent estate or residuary legatees, all the parties interested in the fund must in general be brought before the court, so that there may be but one account and one decree settling the rights of all. And if it appears on the face of the complainants' bill that an account of the whole fund must be taken, and that there are other parties interested in the distribution thereof, to whom the defendants would be bound to render a similar account, the latter may object that all who have a common interest with the complainants are not before the court. In these cases, to remedy the practical inconvenience of making a great number of parties to the suit, and compelling those to litigate, who might otherwise make no claim upon the defendants or the fund in their hands, a method has been devised of permitting the complainants to prosecute in behalf of themselves and all others standing in the same situation, who may afterward elect to come in and claim as parties to the suit, and bear their proportion of the expenses of the litigation. If such parties neglect to come in under the decree, after a reasonable notice to them for that purpose, the fund will be distributed without reference to any unliquidated or unsettled claims, which they might have had upon the same. But if the rights of such absent parties are known and ascertained by the proceedings in the suit, provisions will be made for them in the decree. Anonymous, 9 Price, 210. In either case, the court will protect the defendants against any further litigation in respect to the fund. Farrell *v.* Smith, 2 Ball & Beat. 337.

"In Brown *v.* Rickets, 3 Johns. Ch. 553, Chancellor Kent seems to suppose the case of residuary legatees an exception to the general rule, that one claimant of the fund may file a bill in behalf of himself and all others having a common interest; but every reason

which could possibly be urged against permitting one residuary legatee to sue for himself and all others, without making them actual parties, was equally applicable to the case then before him for adjudication. . . . . The correctness of the opinion of Chancellor Kent on this particular point is questioned by my immediate predecessor in the case of Kettle and wife *v.* Crary, 1 Paige, 417, n. . . . I can see no reason for excepting residuary legatees from the application of the rule, and can find no case, in which the question has arisen, and where it has been directly decided that a part may not sue on behalf of themselves and others."

Married Women.

SEC. 28. Where a married woman is a party, her husband must be joined with her, except that when the action concerns her separate property, or is between herself and her husband, she may sue or be sued alone; and in every such case her separate property shall be liable for any judgment rendered therein against her, to the same extent as would the property of her husband, were the judgment rendered against him. But in no case shall she be required to prosecute or defend by her next friend. Passed April 18, 1870.

This new section changes somewhat the prior provisions of the code. The general provision that husband and wife must join in actions to which she is a necessary party applies to all cases, except: 1. Actions concerning her separate property. 2. Actions between husband and wife. 3. Any judgment obtained against her can be levied on her separate property. 4. She sues in her own name without the intervention of her next friend. By this section, the wife, as regards her own estate, is clothed with all the rights and made liable to the full extent of an unmarried woman. This term, "separate property," in equity had a technical meaning—property conveyed to a trustee for her separate use, in which she had only an equity. Property held by a married woman in her own right was never called separate property: her husband had certain legal rights in such property and could control the use of her real estate, and reduce to possession her personal property. If this language is to be strictly construed, it would have little application to married women in this country, where *separate property*, in the English meaning of those words, hardly exists in this country. But by *separate property*, the legislature must have meant property, the legal title to which was in the wife. Under

our legislation, such property is substantially declared to be her separate property, and the control over the same is taken away from the husband and vested in the wife. Hence separate property of the wife is all property, whether real or personal, the legal or equitable title to which is vested in her; all such property, therefore, is, under our legislation, her separate property, and in regard to that property she can, if she see fit, sue alone, or she can be sued alone, as a *feme sole*, for controversies relating to the same, and all contracts made by her about or affecting the same. As to this property, she is in law regarded as a *feme sole*.

There are still a class of cases where husband and wife must join; such are actions of slander, assault and battery, and all other injuries to her person. In these, husband and wife must join as plaintiffs, and be joined as defendants, where the wife can be sued for her torts. So where land was bought and conveyed to the wife, and the husband and wife give their note for the purchase money, and a mortgage to secure it on the land, it was held that both husband and wife were proper parties, because of his liability on the note in case of a deficiency on the sale of the land, and the wife, because she held the legal title, and both were mortgagors. Conde *v.* Shephard, 4 Pr. 75. If there is a joint interest with the husband in the property, he must be a party, or the suit would be defective; but, if the estate was equitably her own, or solely her own, a next friend, prior to the alteration of the code, other than the husband, was essential. Smith *v.* Kearney et al., 9 Pr. 466; Siezel *v.* Phelps, 7 Simon. 239; Simons *v.* Harwood, 1 Keene, 7; England *v.* Downs, 1 Beavan, 96; Bowers *v.* Smith, 10 Paige, 201; Alston *v.* Jones, 3 Barb. 397; 9 Paige, 257; Howland *v.* Fort Edwards Paper Mill Co., 8 Pr. 505; Towner *v.* Towner, 7 Pr. 387. If the wife is a minor, I suppose she must still sue by next friend or guardian, and defend by guardian, as is provided for in section 30.

By section 29 it is provided that if husband and wife be sued together, the wife may defend for her own right; and if the husband neglect to defend, she may defend for his right also. As this section 28 is merely permissive, *she may* sue or be sued alone. I suppose the husband may be sued with his wife in any action, where at common law he would be liable to be sued with his wife. But where the wife makes a contract herself, touching her separate property, the husband can not be liable, because at common law the wife has no power to bind either herself or her husband by her separate contracts; and she has now no

power to bind herself personally, only to bind her separate property. An action, therefore, on such a contract, would be one in equity to reach the separate property, and not for a personal judgment.

In Slanker *v.* Beardsley, 9 Ohio St. 589, the court held that a married woman might maintain an action against parties, who bought property exempt from execution on a sale by the husband. The court say the act of April 17, 1857, securing to married women such personal property as may be exempt from execution, etc.; prohibits the husband from the sale of such property without the consent of his wife, and that, if sold by the husband, the wife could maintain an action in her own name against such purchasers, either to recover the specific property or to recover the value of the same. Colwell *v.* Cooper, 15 Ohio St. 279, S. P.

Where the husband and wife join in a contract for the sale of her land, and in pursuance of the terms of the contract their joint deed for the land, duly executed and acknowledged by them, is placed in the hands of a third person, to be delivered by him to the purchaser upon his paying the purchase money, the husband and wife may enforce a specific performance of the contract on the part of the purchaser. Farley *v.* Palmer and wife, 20 Ohio St. 223.

Where the husband bought land of A, and by fraudulent representations paid largely more than it was worth, and the land was conveyed to the wife, though paid for by the husband, it was held that the husband alone could sue for the fraud, and it was error to join his wife with him in such action. Partages *v.* O'Neils, 13 Ohio St. 72.

In Coolidge and wife *v.* Parris, 8 Ohio St. 594, it was held that in an action against husband and wife for an assault and battery committed by her, she can not control the management of the defense or compromise the action against the wishes of the husband; and that, if he confess judgment for himself and wife, the court will not interfere at her instance, because she did not consent, but objects to the compromise. This case shows that in those actions, where husband and wife must join, the husband has the control of the action. In this class of cases, the separate property of the wife is not liable for the judgment, unless it was so liable before the code.

Where a married woman holds land by a lease to herself while married, she may in her own name maintain an action to recover

the possession thereof against one who has ejected her therefrom. Dorby *v.* Callaghan, 16 N. Y. 71.

In an action on an award made in the wife's favor touching her separate property, the wife alone should be plaintiff, and not husband and wife. Palmer and wife *v.* Davis, 28 N. Y. 242.

So an action to recover damages done to the wife's land, must be in the name of the wife, but if the husband is joined, his name may be stricken out as surplusage. Ackley *v.* Tarbox, 31 N. Y. 564.

The New York code is like ours in this—that the language is she "*may*" sue alone. These case seem to construe the word "may" as "must." Such is the construction of Johnson, J., in the last case. He says: "The code (sec. 114) provides that when a married woman is a party to an action, her husband must join, except in two cases: 1. Where the action concerns her separate property. 2. Where the action is between herself and her husband. In these two cases it is provided she may sue alone without any guardian or next friend. The intent and meaning of this section of the code, to my mind, is very plain. When the wife is a party the husband is to be joined in all kind of actions, and whatever may be the subject of the litigation, except in two, and in those two he is not to be joined, but she is to sue alone." Whether this is a true construction of the word *may* in this section may admit of argument. If the wife chooses to join her husband, she gives him some rights possibly he would not have if she sued alone in her own name. Whether both join, or the wife sues alone, is a matter of indifference to the defendant; his rights are the same in either case. The New York courts seem, however, to adopt Johnson's opinion on this word in the code. In Ohio, no ruling has been made upon it.

When a woman can be sued and how, for debts contracted by her, there is some conflict in the New York decisions. The case of the Corn Exchange Ins. Co. *v.* Babcock, 42 N. Y. 613, is the last case on that question. That was a special action averring that the wife indorsed the paper of her husband as security, had separate property, and that she by such act bound her separate property. A majority of the court held that a personal judgment might be rendered against her, while Earl, J., dissented. Earl held that the equitable charge thus created by the defendant could only be enforced in equity. The case of Yale *v.* Dederer, 18 N. Y. 265, was an equitable proceeding to charge the property of the wife. It was here held that the wife did not charge her separate

estate by the execution of a promissory note with her husband and as his surety, not for her own benefit or the enhancement of her estate. Comstock, J., says: "The contract of a married woman being void at law, the difficulty of subjecting her estate in equity to the payment of a note or bond given by her was felt by the courts to be very great. The difficulty was, however, overcome, and the rule must now be regarded as settled, that the written engagements of a married woman, entered into on her own account, are to be satisfied out of her separate estate. North American Coal Co. *v.* Dyett, 7 Paige, 9; Heathly *v.* Thomas, 15 Ves. 596; Bullpin *v.* Clarke, 17 Ves. 365; Stuart *v.* Kirkwall, 3 Madd. 287; Owens *v.* Dickenson, Craig & Phil. 48; 2 Story Eq., sec. 1400. This case is in direct conflict with the decision in the case of Corn Exch. Ins. Co. *v.* Babcock, 42 N. Y. 613. This last case was decided by a divided court; Hunt, Lott, and Leonard against the dissenting opinions of Gray and Earl. The case of Yale *v.* Dederer came up again, and is reported in 22 N. Y. 450, when it was held that if she did intend to charge her separate estate it made no difference in the law of the case. The law is thus pretty unsettled in New York.

"Under our code, I do not think this question can arise. She is to sue or be sued alone, only when the action concerns her separate property; and her separate property shall be liable for any judgment rendered therein against her. The suit is to be about her separate property, and that property is to be liable. Now, a married woman's contracts are void, but her contracts about her separate estate are in equity a claim *ad rem*, which in equity can be enforced against her separate estate; and it can be sold or rented to pay any such claim. Under our code, then, the suit against a married woman on contracts touching her separate property must be in equity to subject the land to their payment."

The petition in the case of Logan *v.* Thrift and wife, 20 Ohio St. 62, is one in equity seeking simply to charge the wife's land for a note executed by her with her husband with the design of charging her separate estate. The petition also described the land owned by the wife and against which the plaintiff sought to enforce his claim. The opinion of the court assumes that the remedy is against the separate estate of the wife, and not against her personally; and in my opinion is clearly the law, and in a proper case, the remedy is one in equity to reach the fund, and not an action where a personal judgment can be rendered. The New York court seems to make all the contracts of a married woman valid and binding

upon her, (and yet they are not so) upon a condition that she holds separate property. How much must she have to render her contracts valid? The proposition is absurd in that form; the equitable doctrine is the true one and has reason in its favor. It leaves the law of contracts as it is, and yet leaves the wife's estate liable for her debts made in a proper case.

Infants.

SEC. 30. The action of an infant must be brought by his guardian or next friend. When brought by his next friend, the court has power to dismiss it, if it is not for the benefit of the infant, or to substitute the guardian of the infant, or any person, as next friend.

SEC. 31. The guardian, or next friend, is liable for all costs, and when insolvent, the court may require security for costs.

This is the old law in chancery, and needs no explanation. In Hurlbert *v.* Newell, 4 Pr. 93, it was held that, in a joint suit by husband of age and wife a minor, no guardian for the wife was necessary. Cook *v.* Rowdon, 6 Pr. 233. The next friend for plaintiff need not be appointed by the court. Ibid.

III. *Defendants.*

Little need be said on this head, beyond what has been said in reference to parties plaintiffs. The persons against whom a legal right exists must be made parties defendants. This is the rule as to all actions founded on legal rights.

The rule in cases in equity is equally clear. All persons against whom relief is sought must be defendants, and all others interested in the subject must be either plaintiffs or defendants. It is sufficient here to refer to that ablest of works on that subject—Calvert on Parties in Equity—without undertaking to digest its various rules, which would be essentially of no use to the profession.

The code has been amended as to defendants severally liable on a contract including bills of exchange and promissory notes. By the amended section 58, April 16, 1871, it is provided that when the action is rightly brought in any county, according to the provisions of title four, a summons shall be issued to any other county, against any one or more of the defendants, at the plaintiff's request provided that no maker or drawer of any instrument for the payment of money only shall be held liable in an action thereon, except on cognovit, in any county other than one in

which he or some one of the joint makers or drawers of the instrument resides or is summoned.

This amendment secures makers or drawers of the instrument against being sued otherwise than they would be if the suit was alone one against the makers or drawers. The prior provision allowed all the parties to bills of exchange and promissory notes, whether makers, drawers, or indorsers, to be sued in any county where any one of the parties on the bill could be found. Paper held in Cleveland was, therefore, often indorsed to one residing there, and he to another person, so that service might be had on him, and, in that way, on parties, as makers or drawers, residing in Cincinnati, or elsewhere in the State. But now no maker or drawer can be sued otherwise than if the action was against the makers or drawers. If service is obtained on one joint maker or drawer in one county, service may then be legally had on any other joint maker or drawer in any other county.

Since the first edition of this work, some cases have been decided, giving a construction to this section of the code. In Vorhis *v.* Childs' Ex'r, 17 N. Y. 354, the Court of Appeals, in New York, decided that the administrator or executor of a deceased contractor could not be joined in an action thereon with the surviving joint contractor. But our court has held, in Burgoyne, Adm'r, *v.* Ohio Life Insurance and Trust Co., 5 Ohio St. 586, that, under section 90 of the administration act, the administrator of a deceased joint contractor could be joined as a defendant with his surviving joint contractors; but a several judgment is to be rendered against him as such administrator. But it would seem that this joinder could take place only in cases where the administrator of the deceased obligor denies the liability of the estate, and refuses to allow the claim as a valid one against the estate; in all other cases, no action can be maintained against an administrator, except under certain contingencies. The survivors may be sued at any time, but the administrator can not.

In Carman *v.* Plass et al., 23 N. Y. 286, it was held that an action lies against a lessor, and one who is a party to a lease, and therein guarantees the performance of the lessor's covenant. "This case," says Denio, J., in delivering the opinion of the court, "comes precisely within the language of section 120 of the code of procedure, which provides that 'persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, may all, or any of them, be included in the same action, at the option of the plaintiff.' I see no reason to

doubt that it is likewise within the meaning and intention of the enactment. It relates expressly to several, and not to joint liabilities. The latter do not require the aid of a special provision, for a plurality of joint contractors always could be, and generally were required to be, sued together; and provision was made in the act concerning joint debtors for omitting to serve process on all, if the creditor should so elect. But, though this were otherwise, the provision in question relates, in terms, to cases where a plurality of persons contract several obligations in the same instrument. That is the case here. It may be said that the cause of action is not, in this case, precisely the same against both defendants. The lessee engaged to pay the rent unconditionally, and the surety was under no obligation until the principal had made default. But after such default, each of them was liable for the same precise amount absolutely. They were, therefore, within the language which speaks of persons severally liable upon the same instrument. If this were otherwise doubtful, the reference to suits upon bills of exchange and promissory notes makes it entirely certain that the present case was one of those in the contemplation of the authors of the section. The parties to such paper are included in the provision. The indorsee of a bill or note and the drawer of an accepted bill are only liable contingently, and after being charged upon a default of the maker or acceptor. They were included in the scope of the enactment, because, though, in a general sense, parties to the paper on which their names are placed, they are not parties to the obligation or instrument, in the same strict sense as the surety in the case under consideration."

In Creed *v.* Hartman, 29 N. Y. 591, the question as to defendants under the code came up again for consideration. In that case, the defendant was one of a firm who had contracted to build a block of houses in the city of New York. The contractors made a subcontract with one Brady, to make all necessary excavations. He was to guard against accidents by proper precautions, and all damages were to be made good by him. The sidewalk was excavated and covered with boards by some one; the defendant's foreman was in the habit of putting up guards at evening. Mary Creed, one of the plaintiffs, in passing over the platform, broke through and fell into the excavation. She was injured, and her thigh fractured. The defendant moved for a nonsuit, upon the ground that Brady was the party guilty of negligence, if any; that the plaintiff was guilty of negligence; and that the partner of the defendant was a necessary party.

Selden, J.: "The excavation was made on the defendant's account, and at his request, in a public street, for a private purpose of the defendant, in which the public had no interest, and, so far as the case discloses, without the consent of the corporate authorities. The act of making the excavation was wrongful, without reference to the manner in which it was made or secured. The defendant was, therefore, liable for the injury which the excavation produced to third persons, without fault on their part, whether the workmen were guilty of negligence or not. Congreve *v.* Smith, 18 N. Y. 79; Dygert *v.* Schenck, 23 Wend. 446; Coupland *v.* Hardingham, 3 Campb. 398. The basis of the defendant's liability is his own wrongful act in procuring the excavation to be made without authority, and not the negligence of the contractor or his workmen in performing or guarding the work.

"The ground upon which I have placed the liability of the defendant furnishes an answer to the objection that his partner should also have been made a defendant. The making the excavation without license was a tort on the part of both the defendant and Eberspucher (his partner), and the liability for torts committed by more than one person is always several as well as joint. Law *v.* Mumford, 14 Johns. 426. I doubt whether the rule would be different if the liability of the defendant should be held to depend upon the negligence of the common agent of him and his partner. Champion *v.* Bostwick, 18 Wend. 185, 186." Ingraham, J., in the same case, uses this language: "The defendant was one of a firm who had the contract for erecting the buildings. Both of the parties were alike guilty of negligence, and both might have been sued for such negligence; but each of them was equally liable, if any liability existed; and there is no rule which makes both parties necessary parties to an action of this character. There was a separate liability as well as a joint one, and the plaintiff might, at his election, sue both or either of them. 14 Johns. 426."

This case shows that where one is injured by the common negligence of several, he can sue one or more, or all, and it is optional with the plaintiff which course he chooses to take; the party sued has no right to object, because his co-trespassers or co-wrongdoers are not also included in the action against him.

So, also, a joint action will lie against principal and agent for a personal injury caused by the negligence of the latter (in the absence of the former), in the course of his employment. Phelps *v.* Wait, 30 N. Y. 78. The action was brought against father and son, standing in the relation of master and servant, to recover damages for personal in-

juries caused by the negligence of the son, while driving the horses of his father, the father not being with the son at the time. Hogeboom, J., says: "The cause was retained for examination, principally upon the other point—the supposed misjoinder of parties—, and to enable the defendant's counsel to supply a reference to authorities, showing that in analogous cases principal and agent could not be sued together. The current of authorities is certainly the other way, and in favor of the right to join these parties. And I have been unable, after a somewhat diligent examination, to find any reported case holding a contrary doctrine. The question was carefully considered by the Supreme Court, in the leading case of Wright *v.* Wilcox, 19 Wend. 343, and has since been followed in several other cases. Montfort *v.* Hughes, 3 E. D. Smith, 591; Suydam *v.* Moore, 8 Barbour, 358; Hewett *v.* Swift, 10 Am. L. R. 505."

As the law stood in 1844, a mortgagee was not a necessary party to the petition of an administrator for the sale of lands for the payment of debts. Miller's Ex'r *v.* Greenham's Adm'r, 11 Ohio St. 486. As the statute now is, the mortgagee is probably a necessary party in such a case. 1 S. & C. 622, sec. 287.

In a petition filed by a creditor, to subject the stockholders of a corporation to a personal liability, the creditor should file his petition for the benefit of all the creditors of the corporation, and the corporation as such, and the stockholders thereof, should be made the defendants, as the contribution is a general one on part of all stockholders. 17 Ohio St. 113, Umsted *v.* Buskirk et al. The court say that the corporation ought to be made a party in such an action. Cunningham *v.* Pell, 5 Paige, 607.

Where one of several judgment debtors is insolvent, he is not a necessary party defendant to a bill by the creditor, seeking to make his debt out of the equitable assets of another of the judgment debtors. Van Clef *v.* Sickles, 5 Paige, 505.

Infant Defendants.

SEC. 32. The defense of an infant must be by a guardian for the suit, who may be appointed by the court, a judge thereof, or a probate judge. The appointment can not be made until after the service of the summons.

SEC. 33. The appointment may be made upon the application of the infant, if of the age of fourteen years, and he apply within twenty days after the return of the summons. If he be under that age, or neglect to apply, the appointment may be made upon

the application of any friend of the infant, or on that of the plaintiff in the action.

If the infant does not apply in the twenty days, he may apply at any time before an appointment is made, on the application of a friend or the plaintiff. After the twenty days, either of said parties may apply, and the appointment will be valid. M'Connell *v.* Adams, 1 Code, N. S. 114.

A judgment taken against an infant without a guardian is irregular, and will be set aside on motion. Kellogg *v.* Klock, 2 Code, 28.

CHAPTER V.

THE COUNTY IN WHICH ACTIONS ARE TO BE BROUGHT.

SEC. 45. Actions for the following causes must be brought in the county in which the subject of the action is situated, except as provided in section 46:

1. For the recovery of real property, or of an estate, or interest therein;

2. For the partition of property;

3. For the sale of real property under a mortgage, lien, or other incumbrance or change.

SEC. 46. If the real property, the subject of the action, be an entire tract, and situated in two or more counties, or if it consist of separate tracts, situated in two or more counties, the action may be brought in any county in which any tract or part thereof is situated, unless it be an action to recover the possession thereof. And if the property be an entire tract, situated in two or more counties, an action to recover the possession thereof may be brought in either of such counties; but if it consists of separate tracts in different counties, possession of such tracts must be recovered by separate actions brought in the counties where they are situated.

An action to compel the specific performance of a contract of sale of real estate may be brought in the county where the defendants, or any of them, reside.

SEC. 47. Actions for the following causes must be brought in the county where the cause, or some part thereof, arose.

1. An action for the recovery of a fine, forfeiture, or penalty imposed by a statute, except that when it is imposed for an offense committed on a river or other stream of water, or road which is the boundary of two or more counties, the action may be brought in any county bordering on such river, water-course, or road, and opposite the place where the offense was committed.

2. An action against a public officer, for an act done by him in virtue or under color of his office, or for a neglect of his official duty.

3. An action on the official bond or undertaking of a public officer.

SEC. 48. An action other than one of those mentioned in the first three sections of this chapter, against a corporation created by the laws of this State, may be brought in the county in which it is situated, or has its principal office or place of business; but if such corporation be an insurance company, the action may be brought in the county where the cause of action, or some part thereof, arose.

SEC. 49. An action against the owner of a line of mail stages, or other coaches, for an injury to person or property, upon the road or line, or upon a liability as carrier, and any action against a railroad company, may be brought in any county through or into which such road or line passes.

SEC. 50. An action other than one of those mentioned in the first three sections of this chapter, against a turnpike road company, may be brought in any county in which any part of the road lies.

SEC. 51. The provisions of this chapter shall not apply in the case of any corporation created by a law of this State, whose charter prescribes the place where alone a suit against such corporation may be brought.

SEC. 52. An action other than one of those mentioned in the first three sections of this chapter, against a non-resident of this State or a foreign corporation, may be brought in any county in which there may be property of or debts owing to said defendant, or where said defendant may be found; but if said defendant be a foreign insurance company, the action may be brought in any county where the cause, or some part thereof, arose.

SEC. 53. Every other action must be brought in the county in which the defendant, or some one of the defendants, resides, or may be summoned.

The case of Allen *v.* Miller, 11 Ohio St. 374, shows somewhat the construction to be given to this section. In this case, suit was brought in Cuyahoga county by the assignee against the assignor and the debtor of the assignor on an account. The assignor was served in Cuyahoga county and the debtor in Hamilton county; and the court held that the court in Cuyahoga had no jurisdiction over the debtor living in Hamilton county. The court say: "It seems to us that the words 'defendant' and 'defendants,' as employed in those sections of the code (sections 34 and 36) to which reference has been made, in so far as they effect the question of jurisdiction, must be held to mean, not nominal defendants merely, but parties who have a real and substantial interest adverse to the plaintiff, and against whom substantial relief is sought; and to hold otherwise would open wide the door to all sorts of colorable devices, to defeat the policy of the law in respect to jurisdiction—devices difficult to detect, but oppressive and wrongful in their practical operation." *Vide* also Hadley *v.* Dunlap, 10 Ohio St. 1.

Actions by infirmary directors, for relief to transient paupers, having a settlement elsewhere, may be brought, either in the county for which the plaintiffs are infirmary directors, and where the relief was furnished, or in the county in which is the city or township which is liable for the support of the pauper. 15 Ohio St. 409. This is provided for in the statutes regulating paupers and infirmaries in this State.

SEC. 54. In all cases in which it shall be made to appear to the court that a fair and impartial trial can not be had in the county where the suit is pending, the court may change the place of trial to some adjoining county.

The mode of obtaining a change of venue is by motion setting out that the party can not have a fair trial in that county, because the people are deeply prejudiced against the party moving, or any other reason showing that a fair trial can not be had; and this motion is to be supported and opposed by affidavits proving the facts set up in the motion, or giving the opinion of the witness as to the difficulties of a fair trial.

The court is to transfer the case to some adjoining county; but this question must be decided by the court transferring the case, and not by the court to which the transfer is made.

Where the case is transferred on the simple affidavit of a party, under the statute, the opposite party having had on this question

no day in court, may, by motion before the court to which the transfer is thus made, obtain a dismissal of the transfer on the ground that the facts did not, under the law, authorize such transfer; so held in Vinton Common Pleas, in a case from Meigs county. In that case, there were two judges in the sub-district, one of whom was competent to try the case; and that fact was held not to justify the transfer on the simple affidavit of a party that the judge holding the court was not qualified. There was a qualified judge in the sub-district, and it was the duty of the judges so to arrange the business that that judge could hold the court and try the case.

CHAPTER VI.

COMMENCEMENT OF ACTIONS.

A CIVIL action is commenced by filing, in the office of the clerk of the proper court, a petition, and causing a summons to be issued thereon.

The plaintiff must, with his petition, file his *precipe*, stating the names of the parties to the action, and demanding that a summons issue thereon.

FORM OF PRECIPE.

A B, plaintiff,
vs.
C D, E F, and G H, defendants. } *County, ss.* Court of Common Pleas.

The clerk of said court will issue a summons in this case for the said C D, directed to the sheriff of said county of , and one for the said E F, directed to the sheriff of the county of , and one for G H, a minor under the age of fourteen years, directed to the sheriff of the county of . And indorse on summons: The plaintiff claims judgment for $, with interest from the day of .

Aug. 7, 1855. S N, Att'y for Pl'ff.

NOTE.—If more time is wanted for the return under section 59, it should be stated in the precipe thus: "returnable on the day of next."

The above form of an indorsement will answer when the prayer of the petition is for a sum certain, with interest from a given date. But there are a class of cases on contract where the sum claimed is uncertain, and in the form of damages, and all actions for torts are of that character. In these cases the addition to the precipe will be as follows:

And indorse on summons: The plaintiff claims judgment for $ damages.

These two forms will meet all cases, save when, in a mortgage case, a judgment is demanded for the sum due, with interest. In that case the addition will be somewhat as follows:

And indorse on summons: The plaintiff demands a judgment for $, with interest from the day of , A. D. 187 ; and also the sale of certain lands named in petition as mortgaged to secure the payment of said sum, in case said judgment is not paid by a named day.

The clerk must issue the summons from the precipe, and not from the petition. The *precipe* must contain the names of all the defendants against whom it is necessary that a summons should issue; for a summons seems to be necessary, even against such as can not be reached in that way, and against whom publication has to be made. This is implied from the heading to Chapter XI of the code.

So if there are minor defendants, the precipe, if not the petition, should state the age of the minors, so as to show whether they are of the age of fourteen years or not; since the manner of the service is varied by that fact. Sec. 69.

FORM OF A SUMMONS.

The State of Ohio, *County, ss.*

To the Sheriff of County, Greeting:

You are hereby commanded to notify that they have (*or he has*) been sued by in the Court of Common Pleas within and for the said county of , and that unless they (*or he*) answer by the (*here insert the day for answer*) the petition of the said filed against them (*or him*) in the clerk's office of the said

court, such petition will be taken as true, and judgment be rendered accordingly.

You will make due return of this summons on or before the day of , A. D. 18 .

Witness my hand and the seal of said court at the [*Seal.*] day of , A. D. 18 .

W S, Clerk.

If signed by deputy, it should be done in this form:

W S, Clerk,
By R S, Deputy.

The summons is to be indorsed with the sum for which judgment is demanded, and the time stated from which interest was claimed. In the first consideration of this clause, in connection with certain other clauses, it was thought that the indorsement was confined to cases where judgment was demanded for a sum certain with interest from a certain date. This excluded from this provision, actions brought to recover an uncertain sum sounding in damage. But the courts, on a full consideration of the whole code, have decided as suggested in a note to the first edition, that these words for the *recovery of money only* included all common-law actions whether for a sum certain or for a sum in damages.

In section 531, relating to costs, the same language is found as in section 57. The plaintiff is entitled to costs, of course, in actions for *the recovery of money only*. This language must be construed as broadly as that in section 263, though the word *only* is added to section 531, and not to section 263. It can not be supposed that costs in actions for torts were to be left in the discretion of the court. Besides, section 552, in declaring that in certain actions for damages, if the plaintiff recovered less than five dollars he should not be entitled to recover costs, is inconsistent with the opinion that this language *for the recovery of money only*, does not include actions sounding in damages. Hence it seems to be clear that these words, *actions for the recovery of money, or for the recovery of money only,* must be construed to mean the same thing and to include the same actions; and that in all actions, where the parties are in law entitled *to a trial by jury*, the plaintiff must indorse the amount claimed on his summons, according to the nature of the sum claimed. If the amount is one certain with interest from a certain date, it must be so stated; if the amount claimed sounds in damages, it must also be so stated. Hence the indorsement will, of course, vary according to the nature of the claim, and according to the prayer

of the petition. If the claim is one, where interest is demanded on it from a fixed date, then the indorsement must state not only the amount, but the time from which interest is claimed; if the case is one sounding in damages, the indorsement will state the sum claimed as damages.

Section 112 shows that the indorsement for a sum with interest is required in all actions founded upon *contracts, express or implied, for the payment of money only;* in all other cases, the indorsement must be for a sum claimed as damages.

If a different rate of interest is claimed than that fixed by law, the indorsement should show this fact; since judgment can not be rendered for a greater sum than that demanded.

It has been held, that if an indorsement for money is made in an action seeking other relief than a judgment for *money only*, no judgment can be rendered on a default. The reason for this is that the indorsement is a notice to the defendant that the judgment asked for is only a judgment for the *money* stated in the indorsement on the writ. This decision, made first by Gholson, J., in the Superior Court of Cincinnati, was followed by Nash, J., in a case decided in the Washington Common Pleas at its October term, A. D. 1855; and the ruling has ever since been followed, as the true construction of the code. If the party answers to the action, that would be a waiver of the irregularity, since the petition shows him the nature of the case and to that case he files his answer and raises issues on the merits.

It will thus be seen that the distinction between common-law actions and bills in equity is kept up: 1. In relation to the indorsement to be made on the summons; 2. In relation to the trial of the action. In common-law actions the parties are entitled to a trial by jury; in actions founded in equity, the trial is by the court.

The law is now so amended (S & S. 575), that in all actions for the foreclosure of mortgages given to secure the payment of money, or in which a specific lien for money claimed to be due is sought to be enforced, the plaintiff may also ask in his petition a judgment for the money claimed to be due; and such proceedings shall be had and judgment rendered thereon, as in other civil actions for the recovery of money only.

The statute authorizes an anomalous joinder of causes of action, but makes no provision about the indorsement to be made on the summons; it is a common-law action so far as a money judgment is concerned, on the trial of which the parties are entitled to a trial by jury; and hence the statute says the case is to be proceeded in

as an action at common law; it is also a bill in equity so far as the foreclosure of the mortgage, or the enforcement of the lien is concerned. What indorsement shall then be made? If a simple indorsement for a money judgment is put on the summons, then under the rulings no other judgment can be taken; and if no indorsement is made, then the case is in equity and no money judgment can be had. There must be an indorsement of the amount for which judgment is claimed with the date from which interest is to run, and as a precaution, it should also state that an order for the sale of the mortgage premises will be asked for, if the debt is not paid. This gives the defendant full notice of the moneyed character of the action and the double relief sought for by it. Such, I believe, is the practice of all prudent lawyers upon a statute for which this portion of the code does not provide. It would be well if legislation was the result of more mature deliberation. Until the Supreme Court decides the question, this is the only prudent course, if one wishes to be sure he is right under any view the court may take of the statute.

INDORSEMENT TO BE MADE ON THE SUMMONS.

1. The plaintiff claims judgment for $, with interest from the day of , A. D. 187 .

2. The plaintiff claims a judgment for $, for damages by him sustained.

3. The plaintiff claims a judgment for $, with interest from the day of , A. D. 187 , and also the sale of certain lands named in petition as mortgaged to secure the payment of the said sum in case the judgment is not paid by a named day.

No indorsement is required in a case, which, before the code, would have been a bill in equity; hence it is necessary to discriminate very closely what the action is. A bill to settle a partnership may result in a money judgment, but no indorsement is required, because the object of the bill is an *account*. There are many other cases, which call for an account; in these cases no indorsement is required, and when not required, none should be inserted in precipe, and none indorsed on the summons.

The subject of the indorsement to be made on the writ came up for consideration before the District Court, in Washington county, at its September term, A. D. 1858, in the case of Towsly & Lord *v.* Franks. Nash, Peck, and Whitman, JJ.

"The action below, as disclosed in the petition, was founded upon the sale and delivery and putting up of a steam-engine on certain premises of the plaintiffs in error, which are described in the petition; the petition set forth facts justifying his right to a mechanic's lien upon the premises for the machinery so sold and put up, and asked for a judgment for the money and a sale of the property. A summons was issued and the following indorsement entered upon it: 'Amount claimed, $887.88, with interest from May 4, 1853, less certain credits stated.' This summons was returned duly served, and a judgment by default was rendered in the case, finding a lien, and the amount due, and rendering judgment for the amount due, and ordering a sale of the premises in case the sum so found due was not paid within a time stated. To reverse this judgment, this petition in error is prosecuted.

"The court held that in this case no indorsement was necessary, the action not being an action for the recovery of money only. The action is founded upon principles of equity, and not upon a common-law right; hence, this indorsement was calculated to mislead the defendant; he had a right from this indorsement to infer that a simple judgment for the sum indorsed was all that the plaintiff demanded in his action. This irregularity had not been waived, as the judgment was taken on a default.

"The service in this action was not a good service for the judgment rendered; the writ as served did not truly indicate the nature of the action, nor of the judgment which was rendered in the case. Hence, we think there was error in the rendition of the judgment, and the same must be reversed, and the cause remanded for further proceedings."

INDORSEMENT ON THE WRIT.

The plaintiff in this case claims judgment for the sum of $, together with interest thereon from the day of , A. D. 18 .

Attest, W S, Clerk.

The clerk makes this indorsement from the statement in the *precipe*. Hence the clerk need only indorse the writ, when the party has stated in his precipe a sum for which he claims judgment, with the date for interest.

Writs may be sent to any county in the State, when the court in which it is brought has acquired jurisdiction of the cause.

The summons must state the day when the defendant must answer. The time for answer is on or before the third Saturday after the return day. Sec. 103. The summons must be made return-

able on the second Monday after its date, unless a summons has to be issued to another county. In that case it may be made returnable on the third or fourth Monday, as the party shall elect in his precipe.

When a summons has been returned *not summoned*, other writs may be issued until service is obtained.

Writs may be sent at the same time to different counties, where the defendants reside in different counties.

SERVICE OF SUMMONS.

Actual service—By whom made.—The summons shall be served by the officer to whom it is directed. This, of course, includes all his duly appointed deputies.

It may also be served by a private person, not a party to the action, to be appointed by the officer to whom it is directed. The authority must be in writing on the writ. It may be in this form. The court, or a judge thereof, may also, under certain circumstances, appoint one to serve process. Sec. 583.

AUTHORITY TO A PRIVATE PERSON TO SERVE SUMMONS.

I, A B, sheriff of said county of , hereby appoint and authorize C D to serve the within writ of summons.

Dated this day of , 18 .

A B, Sheriff.

How service to be made.—The service must be made by delivering a copy of the summons to the defendant personally, or by leaving one at his usual place of residence, at any time before the return day of the writ.

The only difficulty in the service is sometimes to ascertain the *place* of residence of a party. Where a party has a family with whom he is living, there can be no difficulty; but where one has a family living in the State, which he has left, not for a temporary purpose, but for the purpose of being absent an indefinite time, no service can be made on him by leaving a copy of the writ with his family. This is true of such as are or have been absent in California. Their residence is, for this purpose, no longer here. The language of our statute is, at his *usual* place of residence. The word *usual* place of residence means the place of abode at the time of the service. Gadsden *v.* Johnson, 1 Nott & M'Cord, 89. The true criterion is whether the defendant had or had not abandoned the *domicile* at which the copy was left. Frean *v.* Cruikshanks, 3

M'Cord, 84. If the party is out of the State only for a temporary purpose, expecting to return in a definite time, then his residence is still here, and service may be made by copy at his *usual* place of residence. Ib. A hotel or boarding-house, at which a stranger from another State is sojourning for a few days, can not be considered as his "usual place of abode," within the meaning of a statute authorizing a service of process by leaving a copy at defendant's usual place of abode. White *v.* Primm, 36 Ill. 416. So process for the commencement of an action against a convict in the State prison may be served upon him in the prison; although his right to sue is suspended, he may still be sued, and the suit prosecuted to judgment. Davis *v.* Duffie, 8 Bosw. (N. Y.) 617. Where a writ is served on a person of a different name from the one against whom it was issued, and there is no appearance, the plaintiff can not proceed. Elliot *v.* Holmes, 1 McLean, 466. Where a resident is temporarily absent, leaving an agent, valid service can not be made upon him by leaving a summons at the last and usual place of abode of the agent. Holmes *v.* Fox, 17 Maine, 107. The service of a writ on Sunday, by the defendant indorsing his appearance, is void. Vanderpoel *v.* Wright, 1 Cow. 209.

Where the defendant is a single man, there is often more difficulty. To justify the leaving of a copy at his boarding-house, he must be actually boarding at the place at the time. If he has left the place, the service is not good.

A defendant may write on the summons that he acknowledges service, and this may be done without the summons being in the hands of an officer.

Questions come up sometimes on a motion to discharge from arrest, or vacate the service because obtained by fraud. There are cases where one has been induced by fraud to come within a jurisdiction, in order to obtain a service upon him. In these cases, the court will interfere and discharge the arrest or set aside the service, because the process of the court has been abused, and a service obtained in a jurisdiction where it could not have been obtained, except by the use of fraud.

In Snelling *v.* Watrous, 2 Paige, 314, the defendant, Watrous, was in contempt for not answering, and an attachment was issued against him, upon which he could not be found. But having applied for his discharge, under the insolvent act, to the recorder of New York, the complainants' counsel opposed his discharge, and procured an order for his personal examination before the recorder. After the examination was closed, and as he was leaving the re-

corder's office, the complainants' counsel caused him to be arrested on the attachment. A motion was made for his discharge. Walworth, Ch., said: "But under the circumstances of this particular case, the defendant must be discharged from the arrest. Where the party has not, in fact, been guilty of a crime this court will not permit the complainant to resort to any unfair and inequitable method to enforce the process of attachment. It is very evident that the proceeding before the recorder to procure the personal attendance of the insolvent was a mere device to enable the complainants to arrest him on this attachment. I can not allow a party thus to abuse the process or the remedial power of any court. In Wells *v.* Gurney, 8 Barn. & Cress. 679, where, by the contrivance of the plaintiff's attorney the defendant was arrested on Sunday, for an assault actually committed, but for the real purpose of detaining him until Monday, so that he might be arrested in a civil suit, the court of King's Bench discharged the defendant from the last arrest."

So, in the case of Stein *v.* Valkenhuysen, Ellis, Blackburn & Ellis, 65; S. C. 96 Eng. Com. Law, 63, where a creditor, by a concerted fraud, induced his debtor, who resided abroad, to come to England, and immediately had him arrested by order of a judge, the court, on an affidavit showing the facts, by rule, set aside the whole, as an abuse of the process of the court. Whitman, J., says: "Now, on these affidavits, I entertain no doubt whatever that all the representations of Smith were mere fictions, made solely for the purpose of inducing the defendant to come to England, that he might be arrested, and that the plaintiffs were parties to this delusion, which produced the desired effect of bringing the defendant here, where he never would have come had he known the truth. Then, having no doubt at all that the defendant was lured to this country by the fraud of the plaintiffs, the next question arises, and it seems to me that the plaintiffs are disabled from taking advantage of their own fraud. It is much as if the plaintiffs had given the defendant an express undertaking that he should not be arrested while in England. Bringing the defendant here by fraud has at least as much effect as if there were an express promise." Crompton, J., said: "But, in the present case, the process of the court has been abused. The debtor, being a foreigner, resident out of this jurisdiction, is, by a concerted trick amounting to a fraud, brought within it. I think that the plaintiffs, being parties to such a fraudulent abuse of our process, are prevented by a personal disability from availing themselves of the act. I doubt much, also, whether

a foreigner brought into the country in this manner, can fairly be said to be about to quit England, within the meaning of the act. And the case is the stronger, as the debt, debtor, residence, and everything is foreign. But this rule is absolute, on the ground that our process is abused. Per curiam. The whole was an abuse of the process. It must all be set aside."

In a note by the editor to this case, we find a statement of the law on this subject. "Where a defendant is brought within reach of the process of a court by a trick, or by the fraudulent abuse of other process, the service of the writ will be set aside." Addicks *v.* Bush, 1 Phila. 19; see Com. *v.* Daniels, 6 Penn. Law Jour. 330; Williams *v.* Bacon, 10 Wend. 636.

The party may, by motion, or by rule of court, call on the plaintiff to show cause why the service should not be set aside, for the reason that the defendant has, by fraud, been brought within the jurisdiction for the purpose of obtaining a service upon him. In England it is done by rule; in this country more often by a motion. In either case, the rule or the motion must contain a statement of the facts by which the party was induced by trick to come within the jurisdiction of the court. In our practice, where a party is inveigled from one country into another, in order to get service on him there, the service would be set aside as an abuse of the process of the court. The law does not allow a party by fraud, to change the jurisdiction over the person, whether from one nation to another, from one State to another, or from one county to another. No party can be allowed to obtain what he deems an advantage over another, by fraud, in any case. The court will vindicate the good faith and honesty of its own process.

Service on Corporations.

A summons upon a corporation may be served upon the president, mayor, chairman of the board of directors, or trustees, or other officer. By the words *other officer*, is meant its *chief* officer—some officer of the same character as those enumerated.

Or, if its *chief* officer is not found in the county, it may be served upon its cashier, treasurer, secretary, clerk, or managing agent.

Or, if none of the aforesaid officers can be found, the service may be made by a *copy* left at the *office* or *usual* place of business of such corporation, with the person having charge thereof.

No service by copy can be made, unless it is left with some one having charge of the office or usual place of business of the corporation. If the corporation has more than one place of doing

business, the service must be made at its principal place of business.

The statute authorizes railroads and some other corporations and companies to be sued in any county through which the line of its road runs. But in these cases the summons must be issued to the sheriff of the county where its main office is kept, and service be made there. This question came up in a case in Athens county some years since, to wit, at May term, A. D. 1858, and, after full argument, was so decided; and such, I believe, is the universal practice. The case I refer to is Bank of Athens *v.* Marietta and Cincinnati R. R. Co., Nash's Pl. & Pr. 784, of the edition of 1864.

The return of service on corporation must be special, and show the facts which authorize the service actually made. This question came up for consideration in the case of Fee *v.* The Big Sand Iron Co., 13 Ohio St. 563. It was there decided that section 66 of the code for the service of summons against a corporation supersedes the mode previously provided by section 97 of the corporation act of May 1, 1852, and thereby secures uniformity in the practice. All service of a summons on corporations must now be made under and in accordance with this section of the code. The court further held that to make the service of a summons against a corporation upon one of the subordinate officers, specified in the section, or by a copy left at the office or usual place of doing business of such corporation, with the person having charge thereof, good, the return must affirmatively show that none of the persons previously named, upon whom service may be made in the order stated, could be found within the county. The court say: "The service in the present case is not shown to be in conformity to the code. The sheriff's return fails to show that personal service could not be made in the county upon the chief officer of the company. A copy of a summons, 'left at the office or usual place of business of such corporation, with the person having charge thereof,' is not good service, unless the return of service shows, in substance, affirmatively, that the chief or other specified officer of the corporation could not be found in the county."

The service must be made on the president, mayor, chairman of the board of directors or trustees, or other chief officer, if he can be found in the county. The question arises, whether the service must be personal on the officer, or whether it can be made by leaving a copy at the usual place of residence of such officer. My

own opinion is that the service must be personal. If the chief officer can not be found in the county, so that a personal service may be made on him, the sheriff may return "not found" as to him, and then service on the next officer named, on which service may be made. Under the Illinois statute, it was held that to give jurisdiction without an appearance by service of process upon a corporation, the return must show either that the president did not reside in or was absent from the county. St. Louis, etc., R. R. Co. *v.* Dorsey, 47 Ill. 288. The section seems to imply the same by saying that if none of the named officers can be found, service may be made by a *copy* left at the office or usual place of business of the corporation, with the person having charge thereof. I think, therefore, the service must be personal when made on the officers named, and only by a *copy*, when none of the officers named can be personally found within the county. The sheriff is bound to ascertain who are the officers of the corporation, and be sure he serves it on the person who is the officer named. Where the plaintiff, in an action against a corporation, is the president of the corporation, service on himself as such president is not good. Bush *v.* Ashuelot, etc., Co., 4 Allen, 357. This rule will apply to all the persons named upon whom service may be made. If that person is the plaintiff, no service can be made on him.

If the service is defective, it may be set aside, on motion, though the return on its face is good. The truth of the return may be tested on such motion. If the copy handed to defendant, or left at his usual place of residence, is not a correct copy of the original summons, or if the indorsement is omitted in the copy, the service will be set aside on motion; so, if served on a wrong person, or the copy is not left at the right place. The existence of any fact showing that the service is not correct, may be set up to vacate it. The motion should state the grounds on which the party relies as showing the service had.

On Insurance Companies.—Service here may be made on an agent, when the suit is properly brought in a county where the company has no other place of business.

Foreign Corporations.—The service in such cases may be on its managing agent, if it has one in the State. A managing agent is one whose agency extends to all the transactions of the corporation, in distinction from one who manages only a particular branch of its business. Brewster *v.* M. Cen. R. R. Co., 5 Pr. 183.

Service on Infants.

On persons under fourteen years.—The service must be on him or her, and also upon his or her guardian or father. If neither of these can be found, then upon the mother, or person having control of the infant, or with whom he or she lives. If neither of these can be found, then upon the minor alone.

On persons over fourteen years.—The service may be on the minor as on an adult.

Forms of Returns.

DEPUTATION OF A PRIVATE PERSON TO SERVE A WRIT.

I, A B, sheriff of said county of , do hereby appoint C D to serve the within writ. Given under my hand this day of , A. D. 18 .

A B, Sheriff.

RETURN.

I, the above named C D, being first duly sworn, depose and say that (*here state the service as in return by sheriff*), and further he saith not. C D.

Sworn to and subscribed before the undersigned, justice of the peace (judge, or in open court, *as the case may be*), this day of , A. D. 18 .

E. F, Justice of the Peace.

The return in such a case must be under oath. Sec. 61.

RETURN OF PERSONAL SERVICE.

As commanded by this writ, I summoned the within named , on the day of , 18 , by delivering to each of said defendants a certified copy of the within summons, and of the indorsement thereon.

Dated

A B, Sheriff.

NOTE.—Where the parties are not all served on the same day, the return must show the day each was served with a copy. In such case, the return might be as above to the names inclusive; *then adding:*

By delivering a certified copy of said summons and the indorsement thereon to the said L, on the day of , to the said M on the day of , etc.

WHERE PART ARE NOT FOUND.

Add to the last, inserting in it the names of those summoned: And the said are not found in this county.

SERVICE ON A MINOR UNDER FOURTEEN YEARS.

As commanded by this writ, I summoned the said E F, a minor under fourteen years of age, by delivering to him on the day of , A. D. 18 , a certified copy of the within writ, and of the indorsement thereon (*if there is an indorsement*), and at the same time I also delivered to , the guardian (or father) of said minor, another certified copy of said writ and indorsement.

Or, and at the same time, I also delivered a certified copy, etc., to , the mother of said E F. Or, to , the person with whom said E F was living, not being able to find in my county any guardian or father of said E F.

ANOTHER FORM.

Follow the last to the close of the service on the minor, then proceed: And not being able to find any guardian or father of said minor in my county, I, at the same time, delivered a certified copy of the said writ and indorsement to , the mother of said E F (or to , the person with whom said E F lives).

If none of these persons can be found the return must be: And I could not find in my county any guardian, or father, or mother of said E F, or any person having control of him, or with whom said E F lives.

SERVICE ON CORPORATION.

1. As commanded by this writ, I have summoned the within-named defendant, to wit (*here insert name of corporation*): by delivering to A B, the president of said corporation, a duly certified copy of the within summons and of the indorsement thereon, this day of , A. D. 18 .

W L, Sheriff.

NOTE.—Where the chief officer of the corporation is a *mayor*, or chairman of directors or trustees, the party on whom service is made must be so named. After giving the name, the return should run: *The mayor of said city, or incorporated town, or the chairman of the*

directors or trustees of said corporation or the *chief officer of said corporation.*

2. As commanded by this writ, I have summoned said (*here insert name of corporation*), by delivering to A B, the mayor of said corporation, a duly certified copy of the within summons, with a copy of the indorsement indorsed thereon, this day of , A. D. 18 .

W L, Sheriff,
By N O, his Deputy.

3. As commanded by this summons, and not being able to find any president (*or mayor, chairman of the directors or trustees, as the name of the chief officer may be,*) of said corporation within my county, I served the same on said (*here give name of corporation*), by delivering a true and duly certified copy of this summons, with the indorsement thereon, to G H, the cashier (*the treasurer, or the secretary, or clerk, or the managing agent,*) of said corporation, this day of , A. D. 18 .

S M, Sheriff.

NOTE.—In the absence of the president, or other chief officer, the writ may be served on either of the above-named officers, and not on the second, in case the first can not be found.

4. As commanded by this writ, and not being able to find any president, cashier, treasurer, secretary, clerk, or managing agent of said corporation in my county, I served the same, by leaving a true and duly certified copy of this summons, and the indorsement thereon, at the office (or usual place of business) of said corporation with one J K, he, the said J K, then having the charge thereof, on this day of , A. D. 18 .

W L, Sheriff,
By N O, his Deputy.

MUNICIPAL CORPORATION.

5. As commanded by this writ, and not being able to find any mayor of said city within my county, I served the same on said corporation, by delivering a true and duly certified copy of this writ, and the indorsement thereon, to one C D, the treasurer (or clerk) of said corporation, this day of , A. D. 18 .

WHERE THE CHIEF OFFICER HAS NO SPECIFIC NAME.

6. As commanded by this writ, I have served the same on said corporation, by delivering a true and duly certified copy of said

writ, together with the indorsement thereon, to one A B, he, said A B, being the chief officer of said corporation, this day of , A. D. 18 .

NOTE.—The character of the return will depend upon the character of the act of incorporation. A city has a mayor, a bank or railroad a president in general as its chief officer; while townships have trustees, school districts directors, with a chairman as chief officer. It is not necessary to recite any other chief officer than the one made such by law.

7. As commanded by this writ, I have served the same on said corporation, by delivering a true and duly certified copy of said writ, and of the indorsement thereon, to one A B, the chairman of the trustees of said corporation, this day of , A. D. 18 .

8. As commanded by this writ, and not being able to find any chairman of the trustees of said corporation within my county, I have served the same on said corporation, by delivering a true and duly certified copy of said writ, and of the indorsement thereon, to one E F, the clerk (or treasurer) of said corporation, this day of , A. D. 18 .

NOTE.—The name is given to the chief officer by the law of incorporation, and the return must use that name and no other. It will, therefore, be necessary, for the sheriff to know what the charter is, and by what name its officers are called. It is the business of the attorney who brings the suit to give the sheriff this information, and instruct him how to make the service, and the proper form of the return. In a case of any uncertainty in the mind of the sheriff, he should consult the attorney of the plaintiff and follow his advice, and then the plaintiff can not complain of what he does. Is the chief officer of the corporation sued, called in the law a president, a mayor, chairman of a board of directors, or trustee, or other name? This fact being ascertained, the service must be on him; if he can not be found, then on the cashier, treasurer, or clerk. It is not necessary in a return against a bank or railroad, the chief officer of which is called a president, to return that you can find no mayor, chairman, or other chief officer; it is only necessary to say you can not find the president, that being its only chief officer. It is enough to say you can not find him, to justify a service on the second grade of officers. Banks

have a cashier, railroads a treasurer and secretary or clerk. The cashier is the secretary or clerk of a bank. There are other corporations, where a board of directors appoint a chairman; while the trustees of townships, the commissioners of the county, appoint a chairman. These things understood, there is little difficulty in making a correct service.

SERVICE ON AGENT OF INSURANCE COMPANY.

As commanded by this writ, I summoned the within-named defendant, by delivering on the day of , A. D. 18 , to E F, the chief officer of the agency of said company in this county, a certified copy of the within writ, and the indorsement thereon.

Dated, etc.

SERVICE ON A FOREIGN CORPORATION.

As commanded by this writ, I have summoned the within-named defendant (*here insert corporate name, if no other defendant is named in the writ*), by delivering, on the day of , A. D. 18 , to E F, a certified copy of this writ and the indorsement thereon, the said E F being the managing agent of the (*name of corporation*), in this State.

Dated, etc.

SEC. 70. Service may be made by publication in either of the following cases:

In actions brought to establish or set aside a will, where any or all the defendants reside out of the State.

In actions brought under sections 45 and 46 of this code, where any or all the defendants reside out of the State.

In actions brought against a non-resident of this State, or a foreign corporation, having in this State property or debts owing to them, sought to be taken by any of the provisional remedies, or to be appropriated in any way.

In actions which relate to or the subject of which is real or personal property in this State, where any defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly or partly in excluding him from any interest therein, and such defendant is a non-resident of the State or a foreign corporation.

And in all actions where the defendant being a resident of the State, has departed therefrom, or from the county of his residence, with intent to delay or defraud his creditors, or to avoid the

service of a summons, or keeps himself concealed therein with the like intent.

SEC. 71. Before service can be made by publication, an affidavit must be filed, that service of a summons can not be made within this State, on the defendant or defendants to be served by publication, and that the case is one of those mentioned in the preceding section. When such affidavit is filed, the party may proceed to make service by publication.

SEC. 72. The publication must be made six consecutive weeks, in some newspaper printed in the county where the petition is filed, if there be any printed in such county; and if there be not, in some newspaper printed in the State, of general circulation in that county. It must contain a summary statement of the object and prayer of the petition, mention the court wherein it is filed, and notify the person or persons thus to be served, when they are required to answer.

SEC. 73. Service by publication shall be deemed complete when it shall have been made in the manner and for the time prescribed in the preceding section; and such service shall be proved by the affidavit of the printer, or his foreman, or principal clerk, or other person knowing the same.

SEC. 74. In all cases where service may be made by publication, personal service of a copy of the summons and complaint may be made out of the State.

AFFIDAVIT THAT SUMMONS CAN NOT BE MADE.

A B, plaintiff,
vs.
C D, E F, G H, L M, and N O, defendants. } *County, ss.* Court of Common Pleas.

And the said A B, plaintiff in the above case, being first duly sworn, deposeth and saith, that on the day of , A. D. 18 , he filed, in the said Court of Common Pleas, a petition against the said C D, E F, G H, L M, and N O, defendants, praying that (*here set forth the object of the suit, so as to show it is one of the cases where publication can be had, as for instance*) certain lands, situate in said county, may be decreed to be sold, to satisfy a mortgage given by the said C D to the said plaintiff, to secure the payment of a certain sum of money therein named, and the said C D has since conveyed said premises to the said other defendants; and the said plaintiff further saith that the said C D has removed from the State of Ohio, and now lives in the State of Iowa; and that the service

of a summons can not be made on the said C D within this State; and the said plaintiff wishes to obtain a service on the said C D by publication; and further he saith not.

A B.

Sworn to and subscribed before the undersigned, a justice of the peace (or judge or clerk of said court), this day of , A. D. 18 .

, Justice of the Peace.

NOTICE.

C D, of , in the State of Iowa, will take notice that A B, of the county of , in the State of , did, on the day of , A. D. 18 , file his petition in the Court of Common Pleas within and for the county of , in said State of Ohio, against the said C D and E F, G H, L M, and N O, defendants setting forth (*here insert the substance of the petition, as for example*) that the said C D gave a mortgage to the said A B on the S. W. qr. of Sec. No. 2, T. 7, R. 15, in said county of , to secure the payment of $, according to certain notes referred to in said mortgage, and that, since the giving of the said mortgage, the other defendants claim some interest in said lands under the said C D, and praying that said C D may pay said sum now claimed to be due, with interest, amounting to $, or that said premises may be sold to pay the same; and the said C D is notified that he is required to appear and answer said petition, on or before the third Saturday after the day of next.

Dated , A. D. 18 .

A B, by E F, his Attorney.

NOTE.—The service will be completed on the day of the last or sixth publication, and the time to answer will be the third Saturday after that day.

The statement above, without the authority of adjudged cases, was made in the first edition, as a proposition as to which there was no doubt. The Court of Common Pleas and the Supreme Court on the circuit had so held for the whole limit of my practice, commencing in 1833, and I supposed that the law thus recognized and acted upon was placed beyond doubt. But it seems that to some minds the code had unsettled everything, and a new construction was to be given to language embodied in our legislation for over fifty years, and early construed, and that construction followed

during all that time. This position has been called in question, and ruling made in direct contravention of the language of the code and the decisions and practice of fifty years. I may, therefore, examine the words of the statute and the decisions of court thereon.

There are two modes of expression in reference to giving a notice by publication: one mode of expression is that notice shall be given so many days before an act is to be; the other is by a publication for so many consecutive weeks in some newspaper. The first of these forms of expression came under consideration in the case of Muskingum Valley Turnpike Co. *v.* Ward, 13 Ohio, 120. The act in that case declared that at least sixty days' notice should be given, in some public paper in general circulation, of the time and place, or places, of paying in the installments. The court held that *one publication*, sixty days prior to the day fixed for the payment of the installment, was sufficient, and that it need not continue to be published from week to week during that time. This construction filled the words of the statute. The court say: "This position (that the notice should be published continuously for sixty days) stands upon the hypothesis that 'at least sixty days' notice' is equivalent to 'notice for and during sixty days.' The words are, however, not equivalent. A notice published once, sixty days or more before the time of payment, is all that the statute requires. Its letter is complied with by that. We are not left at liberty to imagine or suppose, in this case, that one thing is expressed and another intended, because whenever the legislature have designed that a continuous notice should be given, they have used explicit terms." The same ruling was made in Tabler *v.* Wiseman, 10 West. Law Jour. 207. The statute is silent as to the number of times the notice shall be published, say the court, but simply requires a notice to be published forty days prior to the term of the court. A single notice, inserted forty days prior to the term, is a compliance with the language of the statute, and we know of no decision to prevent us from holding a single publication, made forty days prior to the term, sufficient." This was a case in partition. The notice was published from March 11, 1852, to the 15th of April, and the term of the court began on the 17th of May. The objection was that the publication was not continued till the term of the court. The same doctrine is asserted in Craig *v.* Fox, 16 Ohio, 563.

The present statute says that "the publication must be made six consecutive weeks." The next section (section 73) says service by publication shall be deemed complete when it shall have been made

in the manner and for the time prescribed in the preceding section. This act requires six publications in six consecutive weeks, and that the service is complete when this is done. The letter of the statute is then complied with when the six successive weekly publications have been made. What authority have the court here to interpolate into the statute that the first publication shall be made at least forty-two days prior to the time fixed for the answer? The same reason which induced the court to hold one publication in the former case sufficient, will constrain it to hold that the service is complete on the day after the last publication; the statute so says, and the court must so hold. But this question has been repeatedly under the consideration of the court.

The first case to which I will refer, is that of Batchelor *v.* Batchelor, 1 Mass. 255. The statute required the notice to be published *three weeks consecutively.* It was published on Saturday, June 30; secondly, on Saturday, July 7; and thirdly, on Wednesday, July 11. It was objected that there was not a week between the two last publications. "The court held that the order had been substantially complied with. They said it was usual, however, to publish with an interval of a week, but that it was not strictly necessary; the publication had been made in *three successive weeks*, which is sufficient." The same doctrine is asserted in the case of Frothingham *v.* March, 1 Mass. 247.

The next case is that of Sheldon *v.* Wright, 3 Selden, 497. The statute of New York required that notice of an order to show cause in Probate Court why lands should not be ordered to be sold for the payment of debts, should be given not less than six nor more than ten weeks from the time of making it, to be published immediately for four successive weeks. It was held that four successive weekly publications, before the *day fixed* for showing cause, was sufficient. Gray, J., in his dissenting opinion, thus states the position decided by the court: "The position assumed by the defendant and sanctioned by the court below, was that a publication of the order for four weeks successively, immediately preceding the day for showing cause, was all that the statute required, and that its requirements, in that respect, were satisfied by a publication once in each week for four weeks successively, previous to the day appointed for showing cause, notwithstanding the first publication was less than four weeks prior to that day." This proposition the majority of the court, by seven to one, held to be law, by affirming the judgment of the court below. Foot, in delivering the opinion of the majority of the court, says: "I have no doubt that the decision

of the surrogate was correct in respect to the time and manner of publishing the order to show cause. It was in accordance with the language of the statute, and there does not appear to be any reason for a different construction. The decision of the Supreme Court of Massachusetts, in the case of Batchelor *v.* Batchelor, 1 Mass. 255, is directly in point, and appears to have been better considered and to rest on sounder reasons than the adversary opinion of our own court, in an anonymous case involving the same question. 1 Wend. 90." S. C., 7 Barb. 39.

This question came up again in the case of Olcott *v.* Robinson, 21 N. Y. 150. The statute of that State required a notice of a sheriff's sale to be published once in each week, for six consecutive weeks successively before the sale. The notice in this case was published first on Saturday, March 30, and the last publication on Saturday, May 4, and the sale took place on May 8. The court held that this notice was sufficient. Davies, J., in delivering the opinion of the court, cites the words of Wells, J., in Sheldon *v.* Wright, 7 Barb. 39, in which he says: "The first publication, which was on the 27th day of September, was less than four weeks before the 19th day of October, when the parties were required to show cause, etc. This, as a matter of fact, will be seen, upon a computation of time, to be true. But I do not understand the act to require the first of the four successive publications to be four weeks before the day of showing. The requirement is satisfied by four successive weekly publications before the day." "And such," continues Davies, J., "the learned justice says has been the practical construction of the provision of the insolvent laws requiring notice to creditors to be published, in one class of cases, six weeks, and, in another, ten weeks. This case was brought up on appeal (1 Selden, 497) to this court, and the judgment below affirmed. . . . It would seem, therefore, that the weight of authority preponderates decidedly in favor of holding that the publication of the notice in the present case was sufficient. . . . I do not think the statute is to be construed in a manner to lead to such results, but that its plain and literal import is to be followed."

These cases settle the construction to be given to these words, *six consecutive weeks*, as used in various statutes in reference to the publication of a notice. Its plain meaning is six publications in six consecutive weeks, and nothing more. Hence, the publication is complete on the day of the last publication. The only case against this construction is the anonymous one in 1 Wend. 90, and that has been overruled by the Court of Appeals of the same State.

The plain reading of the statute is the one that should be adopted and followed, as it has always been in this State.. The six publications are all that is required, and when those are completed the service is completed. Such is my recollection of the rulings in every case where the statute requires a notice to be published so many consecutive weeks.

AFFIDAVIT OF PUBLICATION.

G H, being first duly sworn, deposes and saith that he is the printer of the , a newspaper printed and published in the said county of , and that the annexed notice was published in said paper for six consecutive weeks, the last publication being on Thursday (or other day), July , A. D. 18 , and further he saith not.

Sworn to and subscribed in open court this day of , A. D. 18 .

Attest, J D, Clerk.

NOTE.—The affidavit may be sworn to before a justice or other officer authorized to administer oaths generally.

AFFIDAVIT ATTACHED TO A PETITION OF UNKNOWN HEIRS.

The said A B, plaintiff, being first duly sworn, deposeth and saith that the names and residence of the heirs of the said , named in said petition, are unknown to him, the said A B, and further he saith not.

A B.

Sworn to and subscribed before me, the clerk of said court, this day of , A. D. 18 .

J D, Clerk.

ORDER OF PUBLICATION.

On motion of the said A B, by E F, his attorney, and it appearing to the court by the affidavit of the said A B, attached to his petition, that the names and residences of the heirs of the said L M are unknown to the said plaintiff, it is therefore ordered that the said plaintiff cause a notice containing the substance and prayer of said petition, and of the pendency of this action, to be published for six consecutive weeks in the , a newspaper printed in , in this county, informing the said unknown heirs of the said L M that they must appear and answer said petition, on or before the third Saturday next after the day of the last or sixth publication.

The following is the section in regard to unknown heirs:

SEC. 76. In actions where it shall be necessary to make the heirs or devisees of any deceased person defendants, and it shall appear by the affidavit of the plaintiff, annexed to his petition, that the names of such heirs or devisees, or any of them, and their residence, are unknown to the plaintiff, proceedings may be had against such unknown heirs or devisees, without naming them; and the court shall make such order respecting service as may be deemed proper. If service by publication be ordered, the publication shall not be less than six weeks.

When may proceed without Service on all.

1. If the action be against defendants *jointly* indebted upon *contract*, the plaintiff may proceed against the defendants served, unless the court otherwise direct.

2. If the action be against defendants *severally* liable, the plaintiff may, without prejudice to his rights against those not served, proceed against the defendants served, in the same manner as if they were the only defendants.

CHAPTER VII.

APPEARANCE.

AFTER the filing of the petition and the service of the summons, the next step is the appearance of the defendant.

Every defendant has the right to appear in person or by attorney, excepting *married women*, *infants*, and *persons non compos mentis*.

The mode of entering an appearance is various. It may be by entering on the record that the defendant now comes and enters his appearance, by asking leave to file a motion, unless that motion is one to vacate a service, and by entering a notice for an appeal or a second trial. As to these last cases, *vide* the case of Fee *v.* Big Sand Iron Co., 13 Ohio St. 563. In this case, where there had been a defective service and judgment on default, it was held that the entering of notice of appeal by the defendant was a waiver of the want of service. I do not believe this case to be

law. The case had gone to judgment, and the court had completed its jurisdiction by rendering the judgment. The defendant was simply exercising a right given by statute to enter his intention to appeal. He did not appeal. He did nothing under the notice; and it seems to me the case stands as if no such entry had been made. And it seems a strange application of the doctrine of appearance to hold a party as to what has taken place already, simply because he gives notice of his intention to do something in the case. This, in my opinion, was not an appearance to the action; it was simply giving a notice of an intention to do something in future. It is giving a retroactive effect to an act which is a mere notice, and not an appearance. The court assume that this is an appearance to the action. This is just what I do not understand it to be. It is not an appearance to the action, because the court at that time had no jurisdiction over the action. The statute requires notice to be entered on the minutes by the party intending to appeal. He enters this notice himself, and the court has nothing to do with it, as I understand the statute. The decision, so far as I have heard it mentioned, has not satisfied the profession. The giving of the notice goes for nothing, if the appeal is not perfected. Such has always been my understanding of the statute. A contrary view of the law seems to be held by the Supreme Court of Missouri in the case of Schell *v.* Leland, 45 Mo. 289, where it was held that the appearance of the defendant for the especial purpose of moving the court to arrest a judgment, constitutes no waiver of any valid objection which he may have to defective process and service. So again, in the case of Steinbach *v.* Leese, 27 Cal. 295, it was held that a defendant, by giving notice of appeal from a decree, does not appear within the meaning of a practice act which provides that a defendant shall be deemed to appear to an action when he answers, demurs, or gives the plaintiff a written notice of appearance. The language of this statute truly defines what is an appearance, only substituting the written notice for the usual record entry that the defendant enters his appearance. So a special appearance by a defendant, for the sole purpose of moving to set aside the service of the summons, is not a waiver of the defect objected to. Upper Miss. Co. *v.* Whittaker, 16 Wis. 220. The rule is thus stated in many cases, and is the true one. A defendant, who has appeared and pleaded to the merits, can not afterward object to the jurisdiction of the court on the ground of the insufficiency of the service of the writ. Lawrence *v.* Bassett, 5 Allen, (Mass.) 140; Indianapolis, etc., R. R. Co. *v.* Renner, 17 Ind. 135;

Ringle *v.* Bickle, 17 Ind. 325; Brady *v.* Richardson, 18 Ind. 1. But the party's appearance by attorney to move for the dismissal of an attachment, and to except to the jurisdiction of the court over him, can not be construed into a submission to the jurisdiction which would authorize a judgment *in personam.* Billiu *v.* White, 15 La. An. 624. Proceeding to trial, after first appearing with a motion to dismiss, for defect in the summons, which is overruled, is no waiver of the irregularity. Deidesheimer *v.* Brown, 8 Cal. 339. An appearance and *answer* waive defects, and give jurisdiction. Buckfield Br. R. R. Co. *v.* Benson, 43 Maine, 374; Blood *v.* Crandall, 2 Wms. (Vt.) 396; Cushingham *v.* Phillips, 1 E. D. Smith, 416; Dewart *v.* Purdy, 29 Penn. St. 113. So a plea in abatement is not such an appearance as to waive process. It may be abandoned, and a motion made to quash for defective service. Halsey *v.* Hurd, 6 McLean, 14. These authorities all look to an appearance to the action and proceeding therein. The giving notice of appeal is no appearance to the action; because, after judgment, there is no case pending in the court to which an appearance could be made. The case from Missouri is the sounder rule, that even a motion in arrest is no waiver of a defective service. I believe no case can be found which will support the ruling in Fee *v.* Big Sand Iron Co. Neither of the cases cited by the court sustain this ruling. In both of these cases the appearance was to the action, and entered before judgment. In the first case the defendant had filed a demurrer to the petition, and in the last case the defendant had consented to the entry of the judgment on the power of attorney. Both of those cases come within the generally received rule, that the party appears, *before judgment*, and pleads to the action. If, in the case of Fee *v.* Big Sand Iron Co., *supra*, the defendant had given bond, and filed his appeal in the court above, he would have entered his appearance in that court, and been bound by any judgment rendered, so far as any defect in the service was concerned.

Married Women.

Married women must appear with their husband, or by their next friend. When the interest of husband and wife is joint, then they may appear and answer together. Still the wife may defend and answer separately; but it requires an order of the court to enable her to do it. Where the wife is sued on her separate property, she must defend by her next friend, and can do this without any application to the court.

The code was amended by the act of April 18, 1869, by which section 28 was so amended as to enable a married woman to prosecute or defend any action without any next friend. 67 Ohio L. 111, sec. 1. A married woman now can defend in her own name, as a *feme sole*, in all cases. The statute is: "But in no case shall she be required to prosecute or defend by her next friend. Wherever a next friend was formerly required, none is now required. Where husband and wife are sued together for the tort of the wife, the husband defends and controls the disposition of the action without regard to the wishes of the wife." Coolidge and wife *v.* Parris, 8 Ohio St. 694. The court say: "The right of the wife, mentioned in the code, is undoubtedly a right involved in the controversy, and its provisions are applicable to equity cases in which the *separate* rights of the wife are by decrees recognized and passed upon as distinct from the rights of the husband. Her inchoate right of dower in premises mortgaged by her and husband; her interests and rights in her separate property, and in property which came to the husband by her, are recognized and frequently passed upon by decree; and, under the code, she may, in such cases, defend her own right.

"But when the action, as in the case now before us, involves no separate rights of the wife, and in which no order or judgment can be rendered, except a joint one, affecting both jointly, the provision of the code can not be applied. Her right in the action, and the right of her husband, are inseparable; and, if they separated in the defense, the court could not, as has been before said, proceed to judgment except jointly against both."

The judge (Swan) further says: "The husband and wife are deemed, in many respects, one person in law. When sued jointly, and for a cause of action, which can not be maintained except by showing a joint liability, and in which they must plead jointly, and one joint judgment must be rendered against them, there is necessarily a unity, which can not be severed. In such a case, if any separate control over the action can be recognized in the wife, it can only be done by making the rights and power of the husband subservient to her. If the wife may control the conduct of the action or defense in another and different way, it must be done by permitting them to plead separately, and to sever in the trial. This would do, if the cause of action were such that separate and different judgments could be rendered against them. But in an action like the one before us, the judgment must be single and joint; and whatever might be the result of a separate defense made by

the wife, contrary to the wishes of the husband, he would be ultimately liable jointly with her for the costs, expenses, and judgment against her. After all, it is a question whether the wife shall control the husband, or the husband shall control the wife, when there is a unity of interest, and they differ. We are not prepared to depart from the old rule, which makes the husband the head of the wife. And such is the common law. Hence, when sued jointly, service of process, at common law, was sufficient on the husband alone, and he could appear and confess judgment for both." Evans *v.* Mylert, 19 Penn. St. 402 ; Benjamin and wife *v.* Bartlett, 3 Mo. 86.

The action in the above case was an action against husband and wife for slanderous words spoken by the wife. The same rule applies to all actions against husband and wife for the torts of the wife. In all these cases there is a joint liability and a joint judgment, and it would seem that the husband must defend for both, unless, refusing to defend, the wife obtains permission to defend for him.

Infants.

Infants must defend by their guardian. Before an answer can be put in by, or a judgment taken against, an infant, the guardian for the suit must be appointed. If the infant is of the age of fourteen years, the appointment, if made within twenty days after the return of the summons, must be made on the application of the infant himself; but if the infant is under fourteen, or does not apply within the twenty days, the appointment may be made on the application of a friend of the infant, or of the plaintiff in the action. The entry of the appointment should show on whose application it is made, as well as the person appointed guardian. No judgment can be taken against an infant until a guardian is appointed ; and if taken, it will be set aside on motion. Kellogg *v.* Klock, 2 Code, 28. It would seem from section 100, that a guardian, when appointed, must answer, and that a judgment taken without such answer, would be irregular and erroneous. 2 S. & C. 981.

The guardian may be appointed by the court, by a judge of the court, or by a probate judge of the county in which the action is pending. The appointment, if made out of court, must be made in writing, and signed by the judge making it ; and be also filed with the clerk of the court. Orders made out of court are required to be entered in the journal of the court. Sec. 510 ; 2 S. & C. 1099.

This is a motion, of course, and does not require any notice to be given to the adverse party, under section 505. 2 S. & C. 1098.

Insane Persons.

There seems to be nothing in the code as to them. The law regulating that subject, 1 S. & C. 848, authorizes the guardian to bring suit, but does not provide for a suit being prosecuted against an insane person. The guardian of a minor, as such, has no authority to defend a suit; the guardian to defend must be appointed by the court; hence the reference to the laws relating to guardians of minors, etc., section 34, 1 S. & C. 848, does not seem to remove the difficulty. In Harrison *v.* Rowan, 4 Wash. C. C. 202, it is held that a lunatic, whose interests are sought to be affected by a decree, must be made a party to the suit, and, if a defendant, must answer by a committee appointed for that purpose by the court; and, if he has no committee, the court will appoint a guardian to defend the suit and answer for the lunatic. In L'Armaureux *v.* Crosby, 2 Paige C. 422, the court says that the proper course is to apply to the court of chancery by petition, and that a proceeding by bill is improper, except under direction of the court. This authority is derived from the general powers of a court of chancery in England; the chancellor having charge of minors and insane persons. It is doubtful whether, in Ohio, we have any means by which a lunatic, or person *non compos mentis*, can be sued. His guardian is authorized to sue; and hence the person having a claim must present it to the guardian, and, if disputed, allow it to be passed upon by the probate court on a settlement of the guardian's accounts. This would seem to be all that can be done in Ohio, in regard to a suit wherein an insane person is interested as a defendant.

When the above was written, the difficulty existed which is there pointed out. But this defect has been supplied by section 7 of the act relating to the organization of courts. 1 S. & C. 384. That section provides that whenever in any suit in court now pending or which may hereafter be instituted, it shall manifestly appear to the court that any person, who is a party to such suit is an idiot, lunatic, or insane person, but for whom no guardian appointed by legal authority is acting, or in case there be a guardian of such person who has an adverse interest, it shall be the duty of the court before proceeding further in the suit to appoint forthwith some suitable person to appear as trustee in such suit for such idiot, lunatic, or insane person, and in his name and on his behalf to prosecute or defend such suit, as the case may be; and in the case, the idiocy,

lunacy, or insanity of such person be not manifest to the court, it shall be the duty of the court before proceeding further in the suit, on the suggestion of the idiocy, lunacy, or insanity of such party upon probable cause, to direct an issue upon the fact, and forthwith to impanel a jury to try and determine the question; and in case of a verdict finding such party idiot, lunatic, or insane, the court shall forthwith appoint the trustee to appear in such suit for such party as aforesaid.

FORMS, WHEN INSANITY MANIFEST.

And now it manifestly appearing to the court here that the said defendant in this action is an idiot (lunatic or insane, as the case may be), and that there is no guardian appointed by legal authority acting for him said defendant (or that his guardian A B, has an interest adverse to him), it is therefore ordered that be, and he is hereby appointed trustee for said so being an idiot (lunatic or insane) and ordered to appear as trustee for said in this suit, and for him and in his behalf to defend this action (or prosecute the same, as such idiot, etc., is plaintiff or defendant), and thereupon came the said and accepted said trust and took upon himself the defense (or prosecution) of this action.

FORM WHERE THE INSANITY, ETC., IS NOT MANIFEST.

And whereas it has here in court been suggested to the court here, that the said , the defendant (or plaintiff) in the action is an idiot (or a lunatic, or insane), and such idiocy (or lunacy, or insanity) not being manifest to the court here, and it however being made to appear to the court here that there is probable cause for believing said is an idiot (lunatic or insane), it is ordered that a jury be forthwith impaneled to try and determine the question whether said is an idiot (lunatic or insane), and thereupon came a jury, to wit (*hers state the names of the jury*), who being duly elected, impaneled, and sworn the truth to speak on said question, after hearing the evidence, do upon their oaths say that said is an idiot, or that said is not an idiot (or a lunatic or insane), and thereupon the court appoint A B as trustee for said so found to be an idiot (or lunatic or insane), for him and in his behalf to defend (or prosecute) this action, and thereupon came the said and accepted said trust, and took upon himself in the name and behalf of the defense (or prosecution) of this action.

Forms.

PERMISSION FOR WIFE TO DEFEND SEPARATE FROM HER HUSBAND.

A B, plaintiff,
vs.
C D and wife, defendants. } Petition.

On motion of the said , wife of the said , and it appearing to the court that the interests of the said (wife) require a separate defense by her, it is therefore ordered that the said (wife) is hereby empowered, authorized, and permitted to defend the said suit, separate and apart from her said husband, and by her next friend.

And thereupon came the said , by E F, her next friend, and filed her separate answer in the petition of the said plaintiff.

OR IN THIS FORM.

On motion of the said , wife of the said , and it appearing to the court that the said has neglected and does neglect to defend this suit, it is therefore ordered that the said (wife) be permitted to defend said action alone and separate from her said husband, and by her next friend.

APPOINTMENT OF GUARDIAN TO THE SUIT.

A B, plaintiff,
v.
C D, defendant. } Petition.

On motion of the said , and it appearing to the court that the said defendant is of the age of fourteen years, it is ordered that be and he is hereby appointed guardian for the suit for the said , and thereupon came the said , guardian for the suit, and accepted said appointment.

On motion of , a friend of the said , a minor, and it appearing to the court that said is under the age of fourteen years, it is ordered that be and the same is hereby appointed guardian for the suit for the said ; and thereupon came the said and accepted the said appointment.

On motion of the said (plaintiff or a friend), and it appearing to the court that said is of the age of fourteen years, and has neglected to apply in person for the appointment of a guardian for the suit for more than twenty days after the return

of the summons, it is, therefore, ordered that be and the same is hereby, etc., *as in last form.*

A B, plaintiff, *vs.* C D, defendant. } *County, ss.* Court Common Pleas.

The said , a minor, of the age of fourteen years, having this day applied to me, , a judge of the said Court of Common Pleas (or probate judge of said county of), and it appearing to me that the summons in this case has been served, and that said is of the age of fourteen years, it is, therefore, by me, the said , judge, as aforesaid, ordered that be and the same is hereby appointed guardian for the suit for the said .

Given under my hand this day of , A. D. 18 .

S N, Judge.

ANOTHER FORM.

E F, a friend of the said , a minor, of the age of fourteen years (or the plaintiff in said cause), having this day applied to me, E S, a judge of said Court of Common Pleas (or probate judge of said county of), and it being made to appear to me that the said is of the age of fourteen years, and that he has neglected for more than twenty days after the service of the summons in this case, to apply for the appointment of a guardian for this suit for himself, the said , it is, therefore, by me, the said , judge, as aforesaid, ordered that be and the same is hereby appointed guardian for the suit for the said .

Given under my hand this day of , A. D. 18 .

S N, Judge.

FOR MINORS UNDER FOURTEEN.

E F, a friend of the said , a minor, under the age of fourteen years (or the plaintiff in the said suit, as the case may be), having this day applied to me, , a judge of said Court of Common Pleas (or probate judge of said county of), and it being made to appear to me that the said is a minor under the age of fourteen years, and that the summons in this case has been duly served, it is, therefore, by me, the said , judge, as aforesaid, ordered that be and the same is hereby appointed guardian for the suit for the said .

Given under my hand this day of , A. D. 18 .

S N, Judge.

CHAPTER VIII.

JOINDER OF ACTIONS.

The code contains the following provisions as to the right to join several actions in one suit;

Sec. 80. The plaintiff may unite several causes of action in the same petition, whether they be such as have heretofore been denominated legal or equitable, or both, when they are included in either one of the following classes:

1. The same transaction; or transactions connected with the same subject of action.

2. Contracts express or implied.

3. Injuries with or without force, to person and property, or either.

4. Injuries to character.

5. Claims to recover the possession of personal property, with or without damages for the withholding thereof.

6. Claims to recover real property, with or without damages for the withholding thereof, and the rents and profits of the same.

7. Claims against a trustee, by virtue of a contract or by operation of law.

Sec. 81. The causes of action so united must affect all the parties to the action, and not require different places of trial. Ladd *v.* James, 10 Ohio St. 437; 2 W. Law Monthly, 591, Hammond *v.* Deaver.

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1. The first general remark on these sections is that actions for torts and on contracts can not be joined. Subdivision 2 provides for cases arising out of contract, and 3 and 4 for cases arising out of torts. And so it has been held in New York. In Furniss *v.* Brown, 8 Pr. 59, Edmunds, J., held that an action to recover specific personal property, could not be joined with a count claiming damages for a breach of a contract of sale of the same property. The same doctrine is maintained in Burdick *v.* McAmbly, 9 Pr. 117. The distinction between actions *ex contractu* and actions *ex delicto* is still important, as a test of what can or can not be now joined.

The Court of Appeals of New York have decided that an action

on a contract and on a tort can not be joined, and that the distinction between the two classes of causes of action is recognized in the code. Lott, J., in Austin *v.* Rowdon, 44 N. Y. 63, 70, says: "The controlling distinction between a declaration on contract and in trover was that in the former the cause and right of action was founded on a contract which was counted on in the declaration and the failure of the defendant to perform it; whereas in the latter, the basis of the action was the finding of the property and the wrongful conversion thereof. Although the form of all actions at law and suits, and all the forms of pleading existing before the code, were thereby abolished, and it is sufficient to state in a plain and concise manner the facts constituting the cause of action, yet the substantive distinction between actions on contract and those founded in tort, still exist."

The second section of the code which defines an action to be an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, *the redress or prevention of a wrong*, or the punishment of a public offense, clearly recognizes the distinction between actions *ex contractu* and *ex delicto*.

Swan, J., in the case of Sturgis *v.* Burton, 8 Ohio St. 215, 218, uses the following language on this subject: "By the provisions of the code the plaintiff may unite in one action all causes of action arising from 'the same transaction or transactions connected with the same subject of action;' and this includes causes of action legal and equitable, *ex contractu* and *ex delicto*. But if the causes of action do not arise from the same transaction, or transactions connected with the same subject of action, then causes of action *ex contractu* can not in general be united with causes of action *ex delicto*."

Since the first edition of this work was published, I have had this section of the code under consideration, and am led to doubt the propriety of the rule laid down in New York, *that contract and tort can not in any case be joined*. I have been led to think they can be, when the two causes of action grow out of the same transaction. The question has been presented in various forms. One was an action brought on a sale of a horse; the first count alleging a warranty that the horse was sound; the second for a fraud in representing the horse to have not been over nine years of age. Hence, the two causes of action grow out of the same transaction, and could have been joined before the code by framing the first

count as a fraudulent warranty; but this can not now be done, since the truth is in all cases to be averred in pleading. It was held that contract and tort might be joined in such a case.

The same question came up again in Lasher *v.* Waterman, in Meigs county. The first count was for use and occupation of certain real estate; the second count averred that while defendant occupied the land stated in the first count, he committed certain waste thereon; and on demurrer, the propriety of this joinder was raised. The court on consideration held that these two causes of action were connected with the same subject of action and grew out of the same transaction. The defendant held the land under a lease, and while so holding it, violated the duty laid upon him by law, by committing the waste complained of in this second count. It seems hardly reasonable to require two actions to settle the question of waste, when an action is pending for the rent. The two causes of action clearly grow out of the same transaction, to wit, the contract of lease by which the defendant occupied the premises. If this view of this section is correct, then any and all causes of action may be united where they grow out of the same transaction, or transactions growing out of the subject of action; unless such is the case, contract and tort can not be joined. The only doubt which can be suggested as to the correctness of this view is, whether waste, committed by one on premises held by lease, can be said to grow out of the same transaction as that which compels him to pay the rent. Where there is an actual lease with covenants against waste, there can be no difficulty; as in such a case a count can be framed in contract; but ought there to be any difference where the party is in under such circumstances as compels the plaintiff to sue for *use and occupation?* It was thought not, and it was therefore held that the two counts could be joined.

2. The next general remark relates to the joinder of causes of action heretofore denominated *legal* and *equitable.* Our code is somewhat obscure; but the history of this clause in the New York code will aid us in understanding our own. Does subdivision 1 control all the others? Does this subdivision fix the limits within which legal and equitable causes of action may be joined? Unless such a construction be given to this section, all causes of action growing out of contract may be joined under the second subdivision. Hence a count on a note or bill of exchange, or a contract to pay money might be joined to a count for the specific performance of a contract, the foreclosure of a mortgage, or the enforcement of a lien for purchase money. It is true that the

concluding clause of the section says that the causes of action so united must all belong to one of these classes; but, if we are to give a literal construction to these words, it would follow that no two causes could be joined unless they grew out of the same transaction. Hence counts upon several notes or bills of exchange could not be joined unless they all arose out of the same contract or transaction. Nor could two separate trespasses be joined. This would be to narrow the right to join separate causes of action, instead of enlarging it, and compel separate suits in innumerable cases where heretofore a single suit was allowed. No longer could a petition be sustained to foreclose two separate mortgages, or for the specific execution of separate contracts.

The first New York code did not contain the words as to joining legal and equitable causes of action, nor the subdivision 1. The courts held that a claim on a demand for money had and received could not be joined with a claim which, under the former practice, would have been the foundation of a bill in chancery, to compel the delivery up of certain notes. Cahoon *v.* Pres. of Bank of Utica, 3 Code, 110; S. C., 7 Pr. 134; Aleger *v.* Scoville, 6 Pr. 131. These cases maintain the doctrine, even where the two different grounds for relief grew out of the same transaction. The code was amended in 1852, and these words were then inserted with the manifest intent of authorizing a joinder of legal and equitable causes of action, where they arose from the same transaction. The reason of this is clear. By the law, as formerly administered, under the double aspect of law and equity, a party was often entitled to bring either a suit at law, or to file a bill in chancery. He had two remedies; but he must elect at once which he would choose to enforce, and his election was made by the bringing of his suit; if he sued at law, he elected to insist on his legal rights; if he filed a bill in equity, he elected to insist upon his rights in equity. As all distinctions between suits at law and in equity were abolished, it seemed necessary that a party should have the right to count in the same action upon the double aspect of his cause; otherwise, if he mistook his remedy or rights in the first instance, he might be barred the bringing of another suit; if not, he would be put to double costs for no benefit to any one. Hence the amendment provided for the joining of causes of action, whether such as had heretofore been denominated legal or equitable, or both, when they grew out of the same transaction, or transactions connected with the same subject of action.

The Supreme Court of Ohio, in the case of The Globe Ins. Co. *v.* Boyle, 21 Ohio St. 119, held that an action might be brought to reform a contract and to recover on said contract so reformed; and if, when reformed, the cause of action would have been a common-law action, then the court will first decide upon the equitable case to reform the contract, and then submit the case to the jury on the contract so reformed. This opinion seems to be based upon the idea that the party on the contract as reformed is entitled to a trial by jury. This is a singular mixture of causes of action, where one is to be tried by the court and the other by a jury. The code (section 263) provides for jury trials. "Issues of facts, arising in actions for the recovery of money, or of specific real or personal property, shall be tried by a jury." This clause has been construed to be as broad as the constitution securing the right of trial by jury, and to include all common-law actions, as they existed before the code. "The right of trial by jury shall remain inviolate." Article 1, section 5, of the present constitution. This clause simply guarantees the right of trial by jury, as it had heretofore existed. If, then, in a case to reform a contract, a court of equity could and did both reform the contract and afford the relief the party was entitled to under such reformed contract, then the parties in such a case were never entitled to a trial by jury as of right, and are not now entitled to such a trial. Moreover, the code does not provide for a trial in such a case. The words, "for the recovery of money, or for the recovery of money only," have been decided to mean the same thing in the section relating to the indorsement to be made on the summons of the amount demanded to the recovery of costs; and the action of replevin and for the recovery of the possession to real estate are common-law actions, and involve the right to a trial by jury. But a petition to reform a contract is a suit in equity; and a court of equity could alone reform a mistake in the reduction to writing of a written contract, and the rule of equity was, that where a court of equity once obtained jurisdiction for a particular purpose, as for discovery, to reform a contract, to vacate a deed, having granted the specific equitable relief, it proceeded to grant full relief, and declined to compel the party to incur the costs of a second suit in a court of law. "Courts of equity," says Story (1 Story's Eq. 418), "will (as we have seen) on this very ground interfere to restrain proceedings at law, until the matter has been properly investigated; and if it finally appears that the deed has been improperly obtained, or that it is contrary to the intention of the parties in their contract, they

will, in the first case, compel a delivery up and cancellation of the deed, or order it to be deposited with an officer of the court; and further direct a reconveyance of the property, if any has been so conveyed, that a reconveyance may be necessary. In the second case, they will either rectify the deed according to the intention of the parties, or will restrain the use of it in the points, in which it has been framed contrary to, or has gone beyond the intention of the original contract. . . . . If they are money securities, on which money has been paid, the money is decreed to be paid back. It is well settled that if the jurisdiction of a court of equity attaches, it will go on to do complete justice, though in its progress, it may decree on a matter, which was cognizable at law. Cathcart *v.* Robinson, 5 Peters, 263. So where, on a bill by a vendor to enforce the specific performance of a contract for the sale of land, it appeared, that by the contract the vendee had the right to relieve himself from the purchase by paying a stipulated sum, it was held that the right of the vendor to come into equity for a specific performance being clear, the court, in refusing to decree such specific performance, might decree the payment by the vendee of such stipulated sum to the vendor, although the vendor might have recovered the same at law. Ib. If certain facts, essential to the merits of a claim purely legal, be exclusively within the knowledge of the party against whom the claim is asserted, he may be required in a court of chancery to disclose those facts; and the court, being thus rightly in the possession of the case, will proceed to determine the whole matter in controversy. Russell *v.* Clark, 7 Cranch, 69. So again, where the court has properly obtained jurisdiction of a cause, for the discovery of facts, in aid of a defense at law, which could not be proved in such suit, the cause may be retained, and the appropriate relief granted. Miller *v.* McCan, 7 Paige C. 457. So where the court restrains proceedings at law for the recovery of money, if relief is refused, at the hearing, payment of the money will be decreed. Speers' Ch. 159, City Council *v.* Page. Where equity has obtained, or can rightfully exercise jurisdiction for one purpose, it will not turn a party out to pursue his remedy at law, on a feature of the case which would be cognizable at law, if it can do justice between the parties. McRaven *v.* Forbes, 6 How. (Miss.) 569. In the case of Miami Exp. Co. *v.* United States Bank et al., Wright, 249–257, the court say that "if there be any one aspect of the case made, which gives the court jurisdiction, it will hold the case in order to do complete justice." So in the case of Hunt & Phillips *v.* Freeman, 1 Ohio, 490, the court held that a court of chancery will

correct mistakes in written agreements, where they originate in fraud or error, and execute it according to the intention of the parties. So relief will be afforded in equity against the payment of notes given for a void patent right, and the money paid on such notes may be recovered back in equity. Darst *v.* Brockway, 11 Ohio, 462. In this case, the court say that "having acquired jurisdiction for a lawful purpose, a court of equity will retain the cause and do full justice between the parties;" so the court decreed the repayment of money which had been paid on some of the notes to indorse before due without notice. So a bill in chancery may be sustained on a *lost deed* to recover damages for the breach of a covenant of warranty. Michael *v.* Mills, 17 Ohio, 601. Jurisdiction properly acquired by a court of equity, it will settle matters between the parties, which do not afford original ground of jurisdiction. Brook *v.* Stolley, 3 McLean, 523.

These authorities show conclusively that when a court of equity obtained jurisdiction to reform a contract, to set up a lost deed, to vacate a deed, etc., it will retain the case, and do complete and full justice to the parties, and not turn the parties round to a court of law to complete the legal effect of the decree in chancery; but it will go on and decree the rights of the parties under the reformed contract, to assess the damages recoverable on the covenants in a lost deed, and restore the party to the possession of lands obtained under a fraudulent deed. Such having been the law before the code, is now the law, and right of trial by jury exists in these cases.

But care must be taken to discriminate these cases from those where equitable and legal causes of action are joined as growing out of the same transaction. In these cases the equitable case must be tried by the court, and the legal case by a jury. Different issues must be made up in each case according to its character; indeed, each count should be treated as a separate action, the one in equity and the other at law. The case of Davis *v.* Morris, 36 N. Y. 569, is one of this character. It holds that, under the code of procedure, the complaint may embrace both legal and equitable causes of action in such cases. The legal causes may be tried by a jury, and the equitable causes by the court. *Vide* also Penn. Coal Co. *v.* Del. & Hud. Canal Co., 1 Keys, 72.

But there is a distinction to be observed: Are there two distinct causes of action, or do the facts allow of relief in equity or admit of an action at law; and in either of which cases complete relief can be obtained? The case of Penn. Coal Co. *v.* Del. & Hud.

Canal Co., 1 Keys, 72, is one of these. Here are no two causes of action, but a transaction which affords ground for *one* of two modes of relief. In such a case the plaintiff must elect in his petition the kind of relief he demands, and he can have no other. Where, therefore, the complaint and prayer in such a case are such as to embrace both equitable and legal remedies, the defendant may move the court to compel the party to elect on which part of the case he will proceed. So, where a party brings an equitable action, he must maintain the same on equitable grounds, or fail, even though he prove a good cause of action at law on the trial. Mann *v.* Fairchild, 2 Keys, 106. In Heywood *v.* City of Buffalo, 14 N. Y. 534–540, Johnston, J., says: "It is claimed that the Superior Court, being possessed of both law and equity powers, had jurisdiction of the subject matter, and, having jurisdiction, should have rendered judgment appropriate to the injury complained of and admitted by the demurrer. But its equitable powers only were invoked, and if the plaintiff failed to make out a case of equitable cognizance in his complaint, he was entitled to no judgment. Because the same court had power to set aside the assessment, had all the proceedings been removed into it by the appropriate writ from the inferior tribunal, it does not follow that a party may have the same relief in any other form of proceeding. . . . Whatever distinctions may have been abolished by the code of procedure, this certainly has not. Indeed, it is still the law that a party who brings an equitable action must maintain it on some equitable ground; and if his cause of action is of a legal, and not an equitable nature, he must bring a legal action or pursue a legal remedy. Where a matter is clearly or *prima facie* one of legal cognizance, a party must, in order to maintain an equitable action upon it, state clearly facts sufficient to entitle him to equitable relief, and show that a perfect remedy can not be obtained at law." The reason of this rule is apparent. Parties are to recover or defend according to the allegation of the pleadings; hence, to try an action asking for equitable relief, and render a judgment as upon an action at law, is to depart wholly from the case made, and decide another and a different case, which would be flatly against the fundamental principle of all pleading and of all judicial proceedings To do so would be to avoid a positive provision of the code, that in an action for money, the amount demanded must be indorsed on the summons. To allow an equitable case to be amended into a legal one, would be, by amendment, to state an action when the service had, would be no service. It would seem,

therefore, that where the action is launched as an action in equity, and in which no indorsement on the summons is required of the amount demanded, such an action can not be amended into an action at law, requiring a different service.

Legal and equitable causes of action may then be joined:

I.—1. *When they both arise out of the same transaction.*

2. *When they arise out of transactions connected with the same subject of action.*

1. The first class depends upon the origin of the two claims. The facts out of which they arise, must be the same, and must, under the former practice, have given to the party a right to sue either at law, or in equity. In these cases, the plaintiff may, in one petition, present the double aspect of his case, and recover according to his rights as ascertained upon the trial. We may instance the case where a party has paid or received money on a contract for the purchase of real estate, and one of the parties fails to comply. The vendor can tender back the money paid, and rescind; or tender a deed, and insist on the payment of the purchase money. The vendee, if the vendor refuses to convey, has a right to rescind and recover back the money paid, or to tender the purchase money in full and claim a conveyance. In such cases, however, as the remedies are inconsistent, the plaintiff must demand his relief in the alternative; and, if entitled to both, he must, at the hearing, elect which kind of judgment or relief he will demand. Where the remedies are consistent, he may demand both; as where he asks for the execution of a written contract for the conveyance of real estate, and the recovery of possession, in addition. So also, on a petition on a note and mortgage, the plaintiff would be entitled to a judgment on the note, and an order to sell the real estate covered by the mortgage. So in Spier et al. *v.* Robinson et al., 9 Pr. 325, it was held that a claim for specific performance of a contract to convey real estate, and for the payment of a reasonable sum for the use and possession thereof, is not the setting up of two distinct causes of action, which can not be legally united. The plaintiff in this case was the vendee, and his claim for use and occupation was for the occupation and use of the land sold between the time when possession should have been given and of the decree. The whole matter was then the subject of an ordinary suit in chancery, as there was at law no right to recover for this occupation. So a suit may be maintained to reform a contract, and enforce the collection of a sum of money due on

such contract, when so reformed. Gooding *v.* McAlister, 9 Pr. 123. It was a matter of equity of jurisdiction, and contained, in fact, but *one cause of action.*

2. The second class depends upon the subject matter of the suit, where the *transactions* are connected with the same *subject of action.* Here are two things upon which the right to join depends: *First.* Upon the *one subject* of action; *Secondly.* Upon *transactions* connected with it. We may remark, first, that tort and contract can not be joined, though they are connected with the same subject of action. Actions to be joined must belong to the same class. Enos *v.* Thomas, 4 Pr. 48; Furniss *v.* Brown, 8 Pr. 59. So, too, they must be consistent with each other. Smith *v.* Hallock, 3 Pr. 73. Hence it was held that the plaintiff could not join a claim to recover land, as the owner thereof, and damages for obstructing him in the use of it, to a greater extent than is authorized by a lease held by the defendant. The first claim, says Strong, J., 8 Pr. 74, is founded on the supposition that the defendant has no right whatever to the enjoyment of the land; and the second, upon an admission that he has a limited right to occupy it. There is a discrepancy between the grounds of the two claims, which is contrary to the rules of pleading; and which, in my opinion, is not sanctioned by the provisions on the subject, in the last addition to the code of procedure. The one hundred and sixty-seventh section, as amended by the act of April 16, 1852, provides (subd. 1) that the plaintiff may unite, in the same complaint, several causes of action, "where they all arise out of the same transaction, or transactions connected with the same subject of action." This has reference to such causes of action as are consistent with each other; not surely to those which are contradictory. The latter can not spring from the same transaction, nor can all of them be connected with the same subject matter, for the palpable reason that they can not coexist. Besides, the fifth subdivision retains the provision in the code previously enacted, authorizing the junction of claims to recover real property, with or without damages for withholding thereof, and the rents and profits of the same. That would indicate that the union, in such cases, should not go further.

In Hulce *v.* Thompson, 9 Pr. 113, Crippen, J., uses the following language in reference to this part of the code: "The allegations in the complaint make the house and door-yard one subject of action. The plaintiff seeks to recover possession of this portion of the property involved in the action; it is a distinct claim or cause of action; it has no connection with the claim of damages

for the trespasses alleged to have been committed by the defendant on other portions of the farm. It is true that both claims or causes of action set up in the complaint, arise from wrongful acts of the defendant; he unlawfully withholds possession of the house and door-yard; he also unlawfully cut the grass, and destroyed the fences, and committed other acts of trespass on the plaintiff's farm, irrespective of the house and yard in question. Yet the difficulty remains, that withholding the possession of the house and yard, and the committing of the trespasses, do not proceed from the same transactions; neither are they connected with the same subject of action within the meaning of subdivision 1 of section 167 of the code. It is clear from the case, as set forth in the complaint, that the claim in ejectment arises from the defendant refusing to surrender to the plaintiff the possession of the house and door-yard. This, then, as a transaction, has no connection whatever with the trespasses of the defendant in cutting the plaintiff's grass, destroying his fences, etc.; these are entirely distinct and unconnected transactions, having no affinity or relation to each other. Neither am I able to discover, by any fair course of reasoning, in what way the different claims set up are *connected with the same subject of action.* It is manifest that one subject of the action is the house and door-yard; the other is the trespasses committed by the defendant on plaintiff's farm, in cutting the grass, burning fences, etc. It is true that the house and yard are situated on the same farm whereon the grass was cut by the defendant, and other trespasses committed by him; yet the farm is not made the subject of action by the complaint, within the spirit and meaning of subdivision 1 of section 167. Such are the decisions in New York on this singular clause in the code, from which we can hardly infer what will be its final construction.

The suit must be about the same *subject* of action. This clause may be illustrated by the practice prevailing in courts of equity. The thing in dispute is made the test; and the rights of all persons, which attach to this subject or thing in dispute, may be adjusted in a single suit; as where there are several liens or mortgages on the same subject or matter in dispute. In this view, it only requires what the chancery law required—that all parties in interest should be before the court, and all rights which affect the title to the property should be passed upon in a single suit. It would seem that all the rights or causes of action must cover, or be connected with, the identical property, or subject; that, if one cause of action is connected with only a portion of the subject

of the suit that the other relates to, they can not be joined; and yet this construction can not be applied to equitable rights; as where there are different liens on different parcels of real estate, and liens on the whole of it. Here there must be a joinder of all, in order to make a clear title to the real estate; and the chapter on parties requires that such a joinder should be made.

In conclusion, it seems to us that this subdivision (1) must be held to limit the right to join legal and equitable causes of action, and can not be applied beyond that. The other subdivisions must be construed, as they would have been, had this clause never been inserted, except so far as the right to unite legal and equitable causes of actions, coming within the several classes of cases, must be limited and fixed by this subdivision (1). Under the other clauses, no cause of a legal and equitable character can be united, unless they come within the terms of the first clause.

The remark, in the last clause, that the cause of actions so joined *must affect all the parties to the action*, can not be construed literally in cases of equitable rights, connected with real estate, and sometimes with personalty. Parties have often different liens on different parts of the same property; and yet the cause of action of one can not affect all the parties, since others may have no lien on the identical property on which his lien attaches; and yet the liens may be such that, in order to make a clear title to the land or property, it is necessary that the rights of all should be adjusted in the same suit. In such cases, the code must be construed to require all parties interested in the subject matter of the suit to be before the court, before a decree can be rendered. In Title III, section 40, which relates to parties, the court is required to bring other parties in, when a determination of the controversy can not be had without them. In section 40, any person, having an interest in real or personal property, may, on his application, be made a party. We must construe the code, not on isolated titles, or sections, but by a careful survey of the whole; otherwise, innumerable conflicts will arise, and confusion become absolutely confounding.

In regard to the other subdivisions, it may be remarked that the causes which can be united must all belong to a single subdivision. The causes of action which may be united in the same action must all belong to one of the classes contained in the above-quoted section of the code. Sec. 167. Each subdivision, it is fair to presume, was intended to provide for a class of cases not included in the other. Per Crippen, J., Hulce *v.* Thompson, 9 Pr.

113; Burdick *v.* McAmbly, 9 Ib. 117. In this case the judge says: "It is unnecessary to state the absurdity of uniting in one complaint, an action upon a promissory note, another for the conversion of real property, another for seduction, and another for fraud in the sale of personal chattels. The objection is obvious to every member of the legal profession." The same doctrine is stated by Edmunds, J., in Furniss *v.* Brown, 8 Pr. 59, 62; 7 Ib. 134, Cahoon *v.* Bank of Utica. It would be impossible to try such various causes of action by a jury. The number of issues would introduce such confusion, and so distract the minds of a jury, that justice would become more the sport of uncertainty than now.

II. *Contracts, express or implied, may be united.*

This subdivision embraces all contracts, from which a legal liability arises. Can two causes of action, however, arising out of contract, always be joined? They may be inconsistent and limited by subdivision 1. And it is doubtful whether two causes can be united, which require different tribunals for their trial. The code, section 263 (2 S. & C. 1020), provides that "issues of fact arising in *actions* for the recovery of money, or of specific real or personal property, shall be tried by a jury, unless," etc. Section 264 provides that "all other issues shall be tried by the court," etc. Issues of law must first be tried by the court; but if issues of fact, the one to a jury, and another to the court, can be raised in the same action, which shall be first tried? These issues of fact to be tried by a jury are issues in *actions* for the recovery of money, or specific real or personal property, not *issues* on which a recovery in money, etc., can be had. The *action* must be for the recovery of money, etc. It is the *action* to which reference is had, not the *character* of the *issue*. If the *action* is for the recovery of money, etc., then the issues in such an action are to be tried by a jury. The word *action* includes all the causes of action stated or prosecuted in it. Hence all these causes of action must be for the recovery of money, etc., or the action can not be said to be an *action* for the recovery of money, or specific real or personal property. In Cahoon *v.* Bank of Utica, 7 Pr. 134, it was held that causes of action requiring different trials could not be joined. This subdivision (2) is broad enough to justify the joinder of causes requiring different *trials;* but as no provision is made for the trial of such mongrel actions, it must be held that such a joinder can not take place.

III. *Injuries with or without Force, to Person and Property, or either.*

The section provides for the joinder of actions of trespass, as heretofore classed, whether to the person or to property, or to either, and also actions on the case for nuisances, or other incidental injuries. It is clear, from the other subdivisions, that all cases heretofore known as trespass, and trespass on the case, are provided for under this subdivision. Hence, what were actions on the case and trespass may be joined. Trespass, too, to real estate comes under this head. Criminal conversation with plaintiff's wife was held to be an injury to the person. Delamater *v.* Russell, 2 Code, 146; S. C., 4 Pr. 234. So also of an action of seduction. Taylor *v.* North, 3 Code, 9. Claims, however, for injuries to personal property, and for its possession, are different causes of action. Spalding *v.* Spalding, 1 Code, 64; S. C., 3 Pr. 297. Cases for conversion of property will also come under this head, unless they can be so presented as to come under subdivision 5.

IV. *Injuries to Character.*

Under this class are included all actions for verbal and written slander, actions for slander, or libel. In Watson *v.* Hazzard, 3 Code, 218, it is said that a cause of action for a *malicious* prosecution may be joined with one for slander. This can hardly be so, since a malicious prosecution is an injury to the person, certainly as much as seduction or criminal conversation. It can not be said to be an injury to character, since character is not its object; arrest and imprisonment is its object, and character is only incidentally affected, if affected at all.

In Shore *v.* Smith, 15 Ohio St. 179, the court held that a cause of action for slander, in charging the plaintiff with theft, might be united in the same petition with a cause of action for a malicious prosecution for an alleged theft, both being for "injuries to character," within the meaning of clause 3 of section 80 of the code of civil procedure. S. & C. 967, 968. A man's reputation may be destroyed or injured as effectually by preferring malicious indictments or prosecutions against him as by spoken or written words. 3 Black. Com. 135. The above is the whole report of the case; but I could hardly suppose a doubt could be raised on the subject. They could, I believe, be joined under the prior practice, because both actions admit of the same plea and the same trial. The rule laid down in 1 Chit. Pl. 229, is this: "The result of the authorities is stated to be that when the *same plea* may be pleaded, and the *same judgment* given on all the counts of the declaration, or whenever

the *counts* are of the *same nature*, and the *same judgment* is to be given on them all, though the pleas be different, as in the case of debt upon bond and on simple contract, they may be joined." 2 Saund, 117*e*, *h*, Comyn's Dig., Action G. Perhaps the latter, that is, the *nature* of the cause of action, is the best test or criterion by which to decide as to the joinder of counts. An action of slander and an action for malicious prosecution were both actions on the case, and hence could be joined. This class of cases for malicious prosecution must have come under the head of injuries to character, or injuries, with or without force, to the person; and until the question was decided, there was room for contention as to which class it ought to belong. In the case of Harris *v.* Avery, 5 Kansas, 146, it was held that where they related to the same transaction, a count for false imprisonment and slander may be joined. The facts in this case were as follows: Harris met Avery in the city of Fort Scott, and in the presence of several other persons called Avery a thief; said he had a stolen horse; took the horse from Avery, and kept the horse four or five days; arrested Avery, and confined him in county jail for four or five days.

The court say: "It is probably true that the two causes of action for false imprisonment and slander can not, under our code, be united, unless both arise out of the same transaction, one being an injury to the character; but we do not know of any reason why they should not be united when both arise out of the same transaction."

The Kansas code, in this respect, is a copy of ours. *Vide* also Brewer *v.* Temple, 15 How. Pr. 286; Robinson *v.* Flint, 16 Ib. 240.

V. *Claims to recover the Possession of Personal Property, with or without Damages for the withholding thereof.*

This section is equivalent to the old action of replevin, and will lie where that action would have laid. Title VIII, chapter II, section 174, 2 S. & C. 996, clearly shows that such is the meaning of this subdivision. That section says that, in an action to recover the possession of specific personal property, the plaintiff may claim the immediate delivery, etc. A party may, however, claim to recover the specific property without resorting to his replevin; he may demand his property or damages for its loss. Still, in order to maintain such a suit, he must be entitled to the immediate possession. There is, possibly, a class of cases, once included in the action of trover, where this form of action may be resorted to if the petition is properly framed.

VI. *Claims to recover Real Property, with or without Damages for the withholding thereof, and the Rents and Profits of the same.*

This class embraces the old action of ejectment, authorizing, however, an additional remedy in the same action for damages, which were formerly recovered in an action of trespass for mesne profits. So, also, injuries to the real estate, waste, or destruction, may be included in a single action. The *mesne profits*—the rents and profits during the dispossession of the plaintiffs—are the only rents and profits to which it has reference. 8 Pr. 520.

VII. *Claims against a Trustee, by virtue of a Contract, or by Operation of Law.*

This section authorizes the joinder of express and implied trusts.

Effect of Non-Joinder.

A question will arise, whether, if not demanded in a suit to recover specific, real, or personal property, a second suit can be prosecuted to recover the damages sustained by the withholding of the property. It is submitted that a failure to demand the damages, or rents and profits, in the action to recover possession, will be a bar to a subsequent suit to recover what is a mere incident to the first suit. Clearly, in the case of replevin, no second suit could be prosecuted to recover damages for the unlawful detention, and it would seem that the same reasoning should now be applied to a suit to recover real estate.

Again, if a party has both a legal and equitable claim, arising out of the same transaction, can he bring a suit on his legal claim, and a second on his equitable one? Must not a party who holds a note and mortgage, demand his whole rights in one suit? Can he obtain judgment on his note, and then afterward proceed on his mortgage? It would seem that a party should be compelled to set forth his whole claim, growing out of the same transaction. There are other similar cases, in which, to prevent multiplicity of actions, a party should be required to set forth his whole claim in a single action.

CHAPTER IX.

JURISDICTION OF THE COURTS.

The code does not undertake to settle or fix the jurisdiction of the courts. It assumes that the Court of Common Pleas has original jurisdiction both in suits at common law and in chancery.

The jurisdiction of the courts is fixed by the act of March 14, 1853 (1 S. & C. 382), and the acts amendatory thereto. Section 5 of the original act, amended April 29, 1854 (1 S. & C. 386, sec. 33), provides that the Court of Common Pleas shall have original jurisdiction in all civil cases, where the sum or matter in dispute exceeds the jurisdiction of justices of the peace. By section 1 of the act of May 1, 1854 (1 S. & C. 770), justices have exclusive original jurisdiction of any sum not exceeding one hundred dollars, and concurrent jurisdiction in any sum over one hundred dollars, and not exceeding three hundred dollars.

These sections can not apply to matters heretofore the subject of chancery jurisdiction. That jurisdiction has never been held to be conferred under such terms; it has always required express legislation for that purpose. Such has been the history of our former legislation, as may be seen by reference to our former practice, under acts regulating the jurisdiction and practice in chancery. Unless this construction is given to these acts, then justices of the peace possess chancery jurisdiction, where the amount in dispute does not exceed three hundred dollars, and can entertain a petition to adjust a partnership account, compel the specific performance of a contract to convey land, etc. In the latter case, it is not the title to real estate that comes in issue, but the execution of a personal contract.

The chancery jurisdiction must be found in section 6 of the act March 14, 1853 (1 S. & C. 383, sec. 23). This section provides that all processes and remedies, authorized by the laws of this State, when the present Constitution took effect, not hereinbefore provided for, may be had and resorted to, in the courts of the proper jurisdiction under the present Constitution; and all laws regulating the practice of, and imposing duties on, or granting powers to the Supreme Court, or any judge thereof, and the Courts

of Common Pleas, or any judge thereof, respectively, under the former Constitution, in regard to matters not hereinbefore provided for, except as to matters of probate jurisdiction, in force when the present Constitution took effect, shall govern the practice of, and impose like duties upon, the District Courts and Courts of Common Pleas, and the judges thereof, respectively created by the present Constitution, so far as such processes, remedies, and laws shall be applicable to said courts, respectively, and to the judges thereof, and not inconsistent with the act entitled "an act to establish a code of civil procedure," nor with the laws passed since the present Constitution took effect, and which are still in force. The language of the section is somewhat obscure, and the whole extent of its meaning it may be difficult to define. But on this point it is clear; the code gives no jurisdiction; and acts in force when this Constitution was adopted, did give Courts of Common Pleas jurisdiction, in all cases properly cognizable by a court of chancery, in which plain, adequate, and complete remedy can not be had at law. There is nothing in the code inconsistent with this; and hence it must be in force, for the purpose of giving jurisdiction; otherwise, there is no jurisdiction vested in our courts to administer the law of a court of chancery. It can not be given under the words "in all civil cases," without giving the same jurisdiction to justices of the peace, where the sum does not exceed three hundred dollars.

It is, then, an admitted fact that our Courts of Common Pleas have jurisdiction of all cases, whether they were formerly considered matters of common law or equity jurisdiction. All rights heretofore recognized, whether by the common law, or by the law as administered in a court of chancery, can still be enforced in the courts of this State. The whole change the code has made is to call the proceedings in both cases a *civil action*, and the document setting forth the facts of each class of cases a *petition*. Law and equity are still as distinct as ever, and must be administered and enforced according to the distinctive character of the respective codes of law. A proceeding to compel the specific performance of a contract, or to set aside a contract for fraud, must be, in its nature, unlike a proceeding to enforce the payment of a note or bill of exchange, or a claim for trespass on real estate. A change of names can never change the nature of the things named.

To know, then, what can be done in a court of justice, we must find what are the rights of individuals; and we can learn these

only by going back to the fountains of all rights, recognizable in a court of justice; to the common law, and to the law as administered in a court of equity. Whatever facts would heretofore sustain a suit at law or a bill in chancery, will now sustain a *civil action*, and may be prosecuted by *petition*.

CHAPTER X.

PLEADINGS.

THE only pleadings allowed are:

1. The petition of the plaintiff.
2. The answer or demurrer by the defendant.
3. The demurrer or reply by the plaintiff.
4. The demurrer to the reply by the defendant.

I. *Petition.*

The petition must contain,

1. The name of the court, and the county in which the action is brought, and the names of the parties, plaintiff and defendant, followed by the word "petition."

This whole clause, under the New York code, is a mere rule of court; but under our code these veriest matters of form have been declared to be matters of substance. There was no necessity for this provision. Under our law, a case must be tried in the county and court where the suit is brought. Hence all questions of court and venue are settled independent of any statement in the pleadings. The commencement of the suit in court settles both the court and the county where it must be tried. Hence the English doctrine of venue never had any existence in Ohio; the venue here, was fixed by the bringing of the suit; while in England, suit being brought in a court having jurisdiction over the whole of England, an averment of venue was *material*, to show in what county the case occurred; because in that county, the law said, the case must be tried, if tried by a jury. Hence, in its origin, venue in England was a matter of *substance*, and not of *form*, while in Ohio we never had any such law, out of which grew the English doctrine of venue

In England, the place of trial was fixed by the averment of the venue; in Ohio, it is fixed by the bringing of the suit.

The code has, however, enacted that these trifles are now matters of positive law, and hence they must be complied with.

2. The petition must contain a statement of the facts constituting the cause of action, in ordinary and concise language, and without repetition.

Before proceeding to discuss the effect of the operative portion of this clause, we will get rid of what has no legal effect whatever. The words following the word "action" are of this character. The facts are to be stated, and, if stated, then they must be stated in appropriate language, and without unnecessary prolixity. When pleadings were unnecessarily prolix, courts have always exercised the power of striking out unnecessary matter; since to insert it was an abuse of the privileges of the court—a mean of merely increasing costs.

"In ordinary and concise language." What these words mean, it is somewhat difficult to say. If they mean that the facts shall be stated in appropriate language, then they are useless; because facts must always have been so stated. The science of law, like all other sciences, has its fixed and well-defined nomenclature; and facts, when stated in this legal language, were always well stated—so stated that every lawyer knew the exact import of the statement. But, if, by ordinary language, is meant the language of common life, then the clause is absurd; because the language of ordinary life is not conversant with such subjects, and hence has no appropriate language in which to embody such facts. Ordinary men invariably state the *evidence* by which facts in legal contemplation are to be proved, and not the facts themselves. These words can have no legal operation on the balance of the clause; by it the facts, constituting the cause of action, are to be stated, and nothing more, and certainly nothing less.

How, then, are these facts to be stated? This question gives origin to another. The code, under this language, provides for cases arising under the law as administered in a court of law, and in a court of equity. Here are two distinct classes of rights, arising under two distinct systems of law, and two distinct systems of relief. Are the facts in both classes of cases to be stated alike? Or are they to be severally stated, according to the respective natures of the two different systems of law, and the two different systems of relief?

In New York, this question has given origin to infinite confusion,

and to a multitude of conflicting decisions. The cases there are all at sixes and fours, as may be seen by consulting the following cases: Knowles *v.* Gee, 3 Code, 31; Rochester City *v.* Suydam, 5 Pr. 216; Hill *v.* McCarthy, 3 Code, 49; Floyd *v.* Dearborn, 2 Code, 17; Carpenter *v.* West, 5 Pr. 53; Burget *v.* Bissel, 5 Pr. 192; Le Roy *v.* Marshall et al., 8 Pr. 373. These cases recognize the existence of a difference in the manner of stating the facts in a case of equity and in a case at law. Other cases seem to recognize a contrary doctrine. Williams *v.* Hayes, 1 Code, N. S. 148; Milligan *v.* Carey, 3 Code, 250; Clark *v.* Harwood et al., 8 Pr. 470. The weight of authority is in favor of the existence of this difference in the two systems.

But there ought to have been no difficulty about this question. Every civil action is now an action on the case; and the pleadings must, therefore, conform to the nature of each case. The plaintiff claims he has a right of action against the defendant, and in his petition he must state the facts on which he grounds his right of action. How the facts shall be stated will depend upon the nature of the facts themselves, and the kind of judgment he seeks to obtain. A case, therefore, predicated upon the principles of equity law can not be stated like a case founded on a promissory note, a bond, or a covenant, or for an injury arising from torts. Legal and equitable proceedings are essentially different from each other in their origin, nature, and object. In a common-law action, the plaintiff presents an absolute right to relief, in the most concise and expressive language. He states his title, and nothing more. But in a suit in equity, none of this rigid logic prevails. An equitable claim may be composed of numerous independent facts, all of which, or only a portion, may be required to satisfy the court. A legal claim is a single proposition, which must stand in all its parts or fall. The one is a chain which is worthless if a single link fail; the other a rope, composed of numerous strands, some of which may give way, and yet enough remain to secure some relief. *Vide* opinions of Barculo, J., in Le Roy *v.* Marshall, 8 Pr. 373, and of Selden, J., in Rochester City Bank *v.* Suydam, 5 Pr. 216, and Wooden *v.* Waffle, 6 Pr. 145.

And such has been the practice. The two classes of cases, law and equity, can not be forced into one form. Whatever the code might have intended, this is an impossibility. What are *facts* in the one class are not *facts* in the other class. Hence the petition in the one class, say in actions at law, can not be made in the statements of the cause of action to correspond with a petition in equity.

What are *facts* in equity is *evidence* in a common-law action. The distinction, therefore, must be kept up, and a petition in the one case must substantially correspond with a common-law declaration, and in the other the stating part of a bill in chancery. The practice is now in conformity to this view of the code, and it is so because there was no other alternative. A case founded on principles of equity could not be stated in the form of a declaration at law; the nature of the case would not admit of it. And yet care should be taken to avoid the old prolixity in equity pleading. In the old practice in chancery there were three parts to a bill in chancery: 1. The stating part, wherein was set forth the facts constituting the grounds for the relief asked; 2. The evidence as to which the pleader asked for discovery; and 3. The direct examination of the defendant by interrogatories in proof of the case of the complainant. It will be seen that evidence was embodied in a bill in chancery looking to discovery. But no discovery can be sought under the code save to a limited extent by the filing of interrogatories as provided in certain cases. The examination of the parties as witnesses is now substituted for discovery. It will thus be seen that the code embraces within its definition of a petition, only the stating part of a bill in chancery. Hence it is necessary to discriminate between what is a *fact* in the meaning of chancery pleading and the evidence by which that fact is to be supported. The facts of the case founded on principles of equity may, nay, must often be more minute and comprehensive than in a common-law declaration; yet in both cases it is not enough to charge fraud in general terms, but the circumstances by which the fraud was consummated are to be set forth, whether in common-law declaration or plea, as in an old bill in chancery or the answer thereto. General pleading in cases of fraud is allowed in certain cases, as where a third party set up *covin* and fraud concocted between two other persons to injure him. In such a case the party pleading, being a stranger to the *covin* and fraud, is not supposed to know the circumstances of it, and hence he may aver generally that what was done, was done with the fraudulent intent to injure him. So where the *facts* of a case or defense are peculiarly within the knowledge of the other party and not in the knowledge of the party pleading, in such case general pleading is in certain cases allowable. Saunders *v* Stotts, review of, 2 West. Law Jour. 297. In such cases, however, the case must show a transaction to which the party pleading was not a party and is wholly ignorant of the circumstances to be set out. Covin is defined to be a fraud com-

mitted by other parties, to the injury of the party pleading. Wimbish and wife *v.* Taibois, 1 Plowden, 38. This case defines what covin is, and the reason why a general plea in that case is allowable. Montague, C. J.: "Also, there is another reason to prove that the cause of *covin* shall not be shown; for at this time the only thing to be discussed is, whether or no the woman, defendant, was party to the covin, and, as I said, inasmuch as *covin* is a secret thing, whereof by intendment of law a *stranger* can not have knowledge; for this reason the law will not force a *stranger* to show the cause thereof." The same judge in the above case defines *covin:* "For *covin is a secret agreement determined in the hearts of two or more men to the prejudice of another.*" This old case well studied reveals the reason and the application of general pleading. So a party, setting forth a title to which he is privy, must set it forth *specially;* the exception admits of general pleading *only* in favor of *strangers*, who, in the one case, are not *privy to the title*, and in the other *not parties* to the contract, and can not, therefore, *in law* be presumed to have knowledge of them. Patridge *v.* Strange & Croker, 1 Plowd. 85; Gould's Pl. 184, sec. 32; 2 Saund. 112, note 1; Tresham's case, 9 Coke, 110. So also when the facts or *matters tend to infiniteness and multiplicity.*" This relaxation of the original rule extends only to cases, in which the acts required to be done on the part of the defendant, are in some degree *indefinite*, or at least not *precisely ascertained*, either in the obligation or in any other instrument referred to in it." Gould's Pl. 369, sec. 115. Thus, if a sheriff executes a bond with a condition that he will return all writs delivered to him, pay over *all* money that may come to his hands as such sheriff, he may in an action on this obligation plead performance in general terms, leaving it to the plaintiff in his replication to show what particular writ had not been returned, or from whom money had been received and not paid over. The same rule applies to an obligation conditioned for the faithful performance of *all the duties* of any office, or for the payment of *all* moneys one should receive from the obligee; or for the delivery on request of all the fat and tallow of all beasts which the obligor should kill before a certain day. But such cases as these do not arise under the present mode of pleading; the declaration or petition now sets out the specific act constituting a breach of the obligation. Formerly the declaration only averred generally that the defendant had not returned all writs, paid all money, or delivered all fat and tallow, etc., and in the reply the specific default was set out. The present practice is to assign the specific breach complained of in the dec

laration, and thus rendering a general denial of the breach and the replication unnecessary. *Vide* further Gould's Pl. 341, secs 68, 69; Baley, J., in Thompson *v.* Rock, 4 M. & S. 338; 5 Bacon's Abr. 407; Ventris, 9; Thoroughgood's case, 2 Coke, 5. Where general pleading would be allowable at law, it will be allowed in cases founded on principles of equity, as where the party is not a party to the transactions, or can not in law be supposed to know them, and yet in these cases the pleader, after a general averment, might under the old practice set forth what he had been informed the defendant claimed and aver the same not to be true; probably now such pleading would not be allowed, since the old practice was allowed as a means of obtaining a discovery from the defendant, which is now done away with. In practice under the code, evidence is too often spread on the record in an action at law rather than confining equity pleading within the direct definition of a petition contained in the code. The only certain aid one can have on what is *fact* and what is *not fact*, but evidence, is to consult the common-law forms where this distinction is clearly shown and sharply defined. A declaration was defined to be a *statement* of the *facts* on which the plaintiff rested his action or the defendant his defense. These forms, therefore, show what was considered the *facts* of a cause of action or of a defense. In following these, one is sure to be right, and one is equally sure of being wrong by not following them; because when one fails to follow them, he runs into stating evidence; and this is often done because the pleader does not know what are the facts which constitute his cause of action or his ground of defense; and hence he sets forth all his *evidence*, and asks the court to say whether that evidence will justify a recovery. But it is not always enough to state the evidence, as the fact to be proved by that evidence must be stated; as in case of fraud, it is not enough to state the evidence which the pleader claims to prove a case of fraud, because in that case the fraud must be averred directly or there is no issue made on that fact. Selden, J., in Goulet *v.* Asseler, 22 N. Y. 228, says: "Although the code has abolished all distinction between the mere *forms* of action, and every action is now in form a special action on the case, yet actions vary in their nature and there are intrinsic differences between them which no law can abolish. It is impossible to make an action for a direct aggression upon the plaintiff's rights by taking and disposing of his property, the same thing, in substance or in principle, as an action to recover for consequential injury resulting from an improper interference with the property of another, in which he has a contingent or prospective

interest. The mere formal differences between such actions are abolished; the substantial differences remain as before. The same proof, therefore, is required in each of these two kinds of action as before the code, and the same rule of damages applies."

In the case of The People *v.* Ryder, 12 N. Y. 433, 437, Marvin, J., discusses these questions in a clear and sensible way and in confirmation of the above views. "The code," he says, "requires that the complaint contain a plain and concise statement of facts constituting a cause of action without unnecessary repetition. Sec. 142. This rule is substantially as it existed prior to its enactment in actions at law. Chitty says, in general, whatever circumstances are necessary to constitute the cause of complaint, or ground of defense, must be stated in the pleadings, and all beyond is surplusage; *facts* only are to be stated and not arguments or inferences, or matter of law, in which respect the pleadings at law appear to differ materially from those in equity." 1 Chit. Pl. 245. At page 266 he says: "It is a most important principle of the law of pleading that in alleging the fact, it is unnecessary to state such circumstances as merely tend to prove the truth of it. The dry allegation of the fact, without detailing a variety of minute circumstances, which constitute the evidence of it, will suffice. The object of the pleadings is to arrive at a specific issue upon a given and material fact; and this is attained, although the evidence of such fact to be laid before the jury be not specifically developed in the pleadings. Firth *v.* Thrush, 8 B. & C. 387; Dyett *v.* Pendleton, 8 Cowen, 728.

"I have supposed it safe, and a compliance with the code, to state the facts constituting the cause of action substantially in the same manner as they were stated in the old system in a *special* count. By that system the legal issuable facts were to be stated, and the evidence by which those facts were to be established was to be brought forward on the trial. This position will not embrace what were known as the common counts. Facts from which the indebtedness appears should be stated, so that the defendant by his answer may put them in issue or avoid them. Under the present system, it is no longer necessary to state the conclusions of law from the facts previously stated. Under the old system, the facts constituting the cause of action were stated, and then in an action of assumpsit followed the conclusions of law, by means whereof the defendant became liable, etc., and then followed the undertaking and promise upon which issue was joined. The consideration, when necessary, should always appear in the statement of facts

constituting the cause of action. It has been supposed that a wider latitude should be allowed in equity pleading, and that evidence may, to some extent, be incorporated in the statement. The rule of the code is broad enough for all cases, and it permits a statement of facts only as contradistinguished from the evidence which is to establish those facts. But in an equity case the facts may be more numerous, more complicated, more involved; and the pleader may state all the facts in a legal and concise form which constitute the cause of action and entitle him to relief. The rule touching the statement of facts constituting the cause of action is the same in all cases, and the rules by which the sufficiency of the pleadings are to be determined are prescribed by the code.

"Under the old system, the omission to state the time when the facts happened could only be reached by a special demurrer. Is it clear that the omission now, to state when material facts happened, is a cause of demurrer? The complaint is to contain a statement *of facts* constituting a cause of action. It was formerly necessary to state the time when every material and traversable fact happened, but generally it was not necessary to prove the time as alleged, unless it constituted a material part of the contract, or had been stated as descriptive, etc. 1 Chit. Pl. 257. In contemplation of the code, is the *time* generally, when a fact happened, a *fact?* If the time when a fact happened is material to constitute the cause of action, it should undoubtedly be stated. The fact without the time would be insufficient to constitute the cause of action; but if the time is immaterial, I do not think a demurrer will lie for omitting to state it. Suppose the plaintiff alleges that the defendant assaulted and beat him, without specifying any time, could the defendant demur on the ground that the complaint did not state facts constituting a cause of action? He may have another remedy, but I do not think he can demur. Suppose the plaintiff alleges he gave notice to the indorser of the dishonor of the note, but omitted to state when such notice was given, here the time is material. The fact stated will not constitute or aid in constituting a cause of action, unless it occurred at a certain time; disconnected from the time, it would be entirely immaterial; still it would be a notice. . . . It is provided in the code that when the allegations are so indefinite or uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made more definite and certain. The remedy is here given for indefinite and uncertain allegations in the pleading."

This question of time in pleading under the code may be a por-

tion of the fact, which, if omitted, might leave the averment of the fact indefinite, and therefore should ordinarily be inserted. It is necessary to state nearly or about the time the fact happened, in order to know which fact of the kind the pleader referred to. But specific time is not in all cases necessary; when once the main fact is stated, subsequent facts may be averred afterward to have taken place. Chitty treats the averment of time as relating to certainty. He says (1 Ch. Pl. 286): "We have already considered the different degrees of certainty required in pleading, and we have seen that the certainty necessary in a declaration is to a *certain* intent in general, which should pervade the whole declaration, and is particularly required in setting forth the parties, *time*, place, and other circumstances necessary to maintain the action." And *time* is clearly a part of a fact necessary to make the particular fact definite and certain; hence when omitted, the omission is to be corrected by motion to make more definite, and not by demurrer.

The question, then, is presented in a double form, and we will so consider it:

1. *As to cases depending on one's legal rights.*
2. *As to those depending on one's equitable rights.*

18 N. Y. 76; 17 Ib. 354; 22 Ib. 228.

And first, as to the petition in cases arising out of legal rights. In these cases, the facts constituting the right of action are to be stated. Evidence is not to be stated, but *only facts*. The distinction between *facts* and the *evidence* of facts, is well defined in all works on common-law pleading. Hence, if we are to ascertain what facts must necessarily be stated, to show a right to recover, we must go to the works on pleading, and to the law on which such works are founded. The declaration contains a statement of those facts on which the plaintiff founds his right of recovery, and must, of course, allege all that is essential to his right of action. Gould Pl. 172, sec. 7. This language is identical with that of the code; and a statute, containing language having a clear, definite legal meaning, must be construed according to that meaning. Ex parte Hall, 1 Pick. 261; Merchants' Bank *v.* Cook, 4 Pick. 405; Snell *v.* Bridgewater Man. Co., 24 Pick. 296. Such, too, is the prevailing opinion in New York. Facts must be still set forth according to their legal effect and operation, and not the mere evidence of those facts, nor arguments, nor inferences, nor matter of law only. Nor should pleadings be hypothetical. Hand, J., Pattison *v.* Taylor, 1 Code, N. S. 175; Buddington *v.* Davis, 6 Pr. 402; Williams *v.* Hayes, 5 Pr. 473; Howard *v.* Tiffany, 3 Sand. S. C.

695. In Stone *v.* De Paya, 4 Sand. S. C. 681, Oakley, C. J., and Sandford, Duer, and Mason, JJ., held that the rule of pleading in actions for a legal remedy is the same as formerly in this—that *facts*, and not the *evidence* of facts, must be pleaded. The facts, then, must be stated substantially, as they were formerly in a declaration. Howard *v.* Tiffany, *supra;* Buddington *v.* Davis, 6 Pr. 402; Wooden *v.* Waffle, 6 Pr. 145; Dows *v.* Hotchkiss, New York Code, 1852, p. 144, note; Root *v.* Foster, 9 Pr. 37. In this case, Welles, J., says: "I think the complaint in this case conforms, in principle, with the common-law rules of pleading, which, in most cases, are the best *criteria* by which to judge of pleadings under the code." One thing is, however, very clear; if the pleader embodies in his petition the substance of a common-law declaration, he is sure to have a good petition; if he adopts any other form he will never be certain that he has a good petition, until he has the decision of a court of final resort upon its sufficiency.

Every cause of action must now be *specially* stated. If the cause of action is founded on a note, bill, bond, etc., the petition must count on such note, bond, or bill. There are no longer any common counts, save in cases coming literally within the letter of such counts. In the case of an action against the makers and indorsers of a note, or the drawers, indorsers, and acceptors of a bill, the petition must state facts enough against the maker to show his liability to pay, and enough against the drawers and indorsers to show their liability to pay; not only the making of a note, but a demand and notice according to its terms. Spellman *v.* Weider, 5 Pr. 5.

It has been a question in New York, whether the common counts could now be used. Eno *v.* Woodworth, 4 Comst. 249; Blanchard *v.* Strait, 8 Pr. 83. But it seems there can be no valid objection to these counts, in cases coming under their very terms. In such cases, as of goods sold, money had and received, money paid by one for another, and on an account stated, the common counts are a statement of the facts of the case, and any more detailed statement must necessarily run into the evidence by which the facts are to be proved. This form of pleading must be allowed, or the petition must go on and state each particular item of a long account of goods sold, etc. This would be an outrage on common sense, and render pleadings in such cases interminable.

This question has, however, been settled by the New York Court of Appeals, in the case of Allen & Carpenter *v.* Patterson, 3 Selden, 476. The common *indebitatus* count, in the old action of debt, was

there held good. The court say: "The code requires that a complaint shall contain a plain and concise statement of the facts constituting the cause of action." Every fact which the plaintiff must prove to enable him to maintain his suit, must be distinctly averred or stated. The rule of pleading in an action for a legal remedy is the same as formerly in this, that *facts*, and not the *evidence* of facts, must be pleaded. 1 Chitty Pl. 215; Read *v.* Brookman, 3 Term, 159; Eno *v.* Woodworth, 4 Comst. 249. It (the complaint) contains every statement of fact necessary to constitute a good *indebitatus* count in debt, according to the mode of pleading before the code. 2 Chitty Pl. 142; Emery *v.* Fell, 2 Term, 28; 1 Chitty Pl. 345. The same view of the code has been taken by Hand, J., in Stewart *v.* Travis et al., 10 Pr. 148, before the case of Allen *v.* Patterson had been reported. "My own impressions," he says, "have been that the common counts, perhaps with some variations, are still good. A direct allegation of the cause of indebtedness, as the loan of money, the sale of goods, or performance of work and labor, etc., may be preferable to the former recital of indebtedness; but certainly, it must be enough for the plaintiff to state facts sufficient to create a legal obligation upon the part of the defendant, and such violation of that obligation as creates a cause of action; and I think this statement may be according to the legal effect of those facts. I do not see how such pleading can be demurrable, and the objection of variance would not prevail, unless we mean to give an illiberal construction to the code. With few exceptions, there is nothing in this statute that compels us to invent new modes of expressing the same legal proposition. If the pleader in a case, not of equitable jurisdiction (for that distinction is not, nor can it be, abolished by the legislature), must now state all the evidence, and give a minute and voluminous history, and all the details, of the rise and progress of a cause of action or defense; much of it may be pleasant as gossip, but such pleading must necessarily be a slow and perplexing mode of coming at the truth, especially by a trial by jury."

The sensible, and the only sensible rule, therefore, to adopt in regard to the code is, that, while it has abolished the distinction in actions at law, and requires a declaration and a bill in chancery to be called by the same name, "*a petition*," it has left each separate case to be stated according to the law governing that particular case. What does the law require to be stated in this case to constitute a good cause of action? To answer this question, one must resort to Chitty and the cases; and he will there find, and there only, what is necessary to be stated. Is it a case founded upon equitable

principles? Then you must resort to Midford, and Cooper, and Story, if you would learn what *facts* are necessary to be stated, in order to make a good cause of action on paper. The code does not settle this question of what is to be stated, only that a cause of action must be set forth in the petition; and, if we can not resort to acknowledged rules of pleading, to ascertain what facts make out a cause of action, and in what language they are properly stated, where are we to go, to ascertain this important matter, to answer this important question? Does a petition set forth a cause of action? The pleader must resort to either the one or the other of these classes of works; and he can not go elsewhere, as his case is founded either upon *legal* or *equitable* principles, to obtain an answer to his injury. The forms are evidence of what the law is; they show what facts the courts have held to constitute a cause of action, whether those facts constitute a case at law or one in equity. The New York courts, after seven years of uncertainty and confusion, are rapidly coming round to this common-sense view of the matter, as the only way up to light, out of the darkness that has for so long a time enveloped their pathway. They have found that even *reform*, almighty and universal as it claims to be, in these days of boasted enlightenment, can not change the inflexible *laws* of nature and of mind. The mind will, nay, must classify its knowledge, and no legislation, short of a statute of Omnipotence, can prevent it. Hence causes of action will invariably arrange themselves into classes, in spite of the effort of the code to get rid of all classification, and mingle the whole into one indistinguishable mass of confusion. Order will grow up again; arrangement will gradually take place amongst this mass of facts; and a language, suitable to embody these facts, to express these classifications, will be formed; while common language will be left to express the ideas and things with which it is conversant, and withdraw from an undertaking to express matters, and things, and notions, and ideas, with which common language has nothing to do. Every science must have its own facts and ideas, and a scientific language adapted to express them; and what more absurd than to require an Agassiz to express the results of his profound studies in common language? No less absurd is it to require the *facts and notions* of legal science to be expressed in common language.

There are some rules stated in the code, by which the pleader should be governed. Section 129 provides that neither presumptions of law, nor matters of which the courts will take judicial notice, need be stated. This is only a declaration of what the law

of pleading already was. It is unnecessary, says Gould (Pl. 53), to allege matter of law. It is only necessary to allege the facts; of the law the court will take notice; so little necessary or proper is it to put on paper a fact which the court is bound to know. There is, then, nothing new in this; nothing which in the least innovates upon the old established ways.

Sec. 123. This section may not be as harmless as the other. It must have been introduced in utter ignorance of the decision of our own courts. In New York it had a meaning, and was a change for the better; in Ohio it has no meaning, or it is a change for the worse. In New York, as in England, private acts had to be pleaded, set out in full, or so much of them as would show the right of the party to what he claimed. The code, there, substituted for this a mere reference to the act. In Ohio, it had been decided that, as all our statutes, private as well as public, were published by authority, the court would take judicial notice of the former as well as of the latter. In England, private acts were never published; hence neither the courts nor others could know their contents, unless they were set forth in pleading. Brown *v.* The State, 11 Ohio, 276, 280. Under the law, in Ohio, it was never necessary to recite either the body or title to a private act. The facts needed only to be stated, which showed the right under the act, and the court took judicial notice of what were the contents of the act. This section, then, has no meaning here, or it so far changes the law for the worse as to require the absurdity of referring to the title of an act of which the court will take notice. The rule of our court is right, or the English one is. Either the court must take judicial notice of a private act, or it should be set out; otherwise the court has no means of determining whether a good cause of action is set out or not. This New York rule is an absurdity. Our court showed good sense in saying that when the reason of a rule had ceased, the rule ceased with it. The reason of the rule was that such acts were never published by authority, as the general laws were; hence the judges could not take judicial notice of the one, as they did of the other. In Ohio, this reason never did exist; all laws were published in the same volume, with the same authority, and stamped with the same authenticity. And why not, then, take notice of the one as well as the other? The court answered this question like sensible men, not in the habit of sticking in the bark. But now comes the code. What effect had this upon the well-settled law of Ohio? The

code is not mandatory; it is permissive: it shall be sufficient to refer to such statute by its title. But as it was never necessary, in Ohio, to refer to such a statute at all, it will be undoubtedly sufficient to refer to its title, on the ground that surplusage never vitiates; though it might be stricken out, on motion, by another section of the code, as *redundant*, or *impertinent* matter. We may, then, consider this section (123) as a blunder; as a permission to do what no sensible man will be guilty of doing; and so, in Ohio, a work wholly supererogatory. By this construction, we at least render it harmless; which we should not do by a different interpretation.

Sec. 124. This section is also adopted from the code of New York; it was introduced there, to get rid of an absurd decision in the case of Miller *v.* Maxwell, 16 Wend. 9—a decision which, it is believed, was never followed in Ohio. By that decision, it was held that where it was uncertain, from the libel itself, whether it referred to the plaintiff, the facts which showed that the plaintiff was referred to must be stated: that it was not enough to say they were published of the plaintiff. An inducement is only necessary, when the words are actionable only in virtue of some extrinsic fact; then that fact must be set out. Towle *v.* Robbins, 12 Mass. 498; Bloss *v.* Tobey, 2 Pick. 320; Carter *v.* Andrews, 16 Pick. 1; 13 Ib. 198; 15 Ib. 321; 8 Mass. 122; 2 Dev. 115; 14 Maine, 317; 8 N. Hamp. 256. And this section has, in New York, been limited to the single purpose of overruling the case of Miller *v.* Maxwell. "Hence," says Duer, J., in Fry *v.* Bennett, 1 Code, N. S. 247, "where the *meaning* of the words is so ambiguous that extrinsic facts are necessary to be proved, to show them to be actionable at all, the necessity of stating these facts by an explicit averment, is precisely the same as it has always been. As these facts must be proved, to enable the plaintiff to maintain his suit, they are material and issuable in their nature; and a change in the rules of pleading that would have relieved the plaintiff from the obligation of stating them in his complaint, and thus have taken from the defendant the opportunity of controverting them in his answer, would have been highly inexpedient." This section, says Willard, J., merely dispensed with the allegation of extrinsic facts, *showing the application of the words to the plaintiff*, in order to obviate the difficulty which was supposed to have been occasioned by the decision of the Supreme Court, in Miller *v.* Maxwell, 16 Wend. 9. It does not dispense with the necessity of an averment of *innuendo*, when it becomes necessary to show the *meaning of the words themselves.* In these respects,

the rules of pleading remain unaltered. 5 Pr. 171. The same view is taken of this section by Harris, J., in Pike *v.* Wormer, 6 Pr. 90. This section, then, is another which, it is believed, has no application in Ohio; since the rule laid down in Miller *v.* Maxwell never was recognized here as law. Hence the section leaves the law of declaring in libel and slander unchanged in Ohio, and with but a very slight modification in New York.

Sec. 122. This section was introduced for the benefit of ignorance; but had, in New York, received such a construction before the adoption of our code, as should have induced the commissioners to have left it out altogether, as being in no whit an aid to the meritorious class for whom it was intended. Our commissioners, too, reported an absurd form from the New York code, after it had been held bad by the courts of that State. In Ranney *v.* Smith, 6 Pr. 423, Marvin, J., says: "If it is intended by this section to dispense with a statement of facts constituting the cause of action, or new matter constituting a defense, it is a wide departure from the system of pleading, as previously established by the code. How are issues to be formed? May a complaint contain simply a copy of the note, followed by the allegation that there is due to the plaintiff a certain sum, and that he claims such sum? If so, upon what is the defendant to take issue?" "My opinion is," says Welles, J., in Bank of Geneva *v.* Gulick et al., 8 Pr. 51, "that it was not the intention of the legislature by section 162 (section 122 of our code) to dispense with any of the requirements of section 142 (section 85 of our code). The last-mentioned section lays down and establishes the rule in general terms, as to what a complaint must contain; and section 162 is designed to relieve the party from setting out the written instrument according to its legal effect. It could not have been intended, I apprehend, to excuse him from stating his interest in, or title to it, or from alleging such other facts, outside of the instrument, as were necessary to enable him to recover upon it." The same doctrine is maintained by Bacon, J., in Prindle *v.* Caruthers, 10 Pr. 33, and by Strong, J., in Chappell *v.* Bissell, 10 Pr. 275. The decisions in New York have been uniform as to the effect of this section, and as it requires, really, just as much as the other sections of the code, no forms are given of declaring under it. This book is meant for lawyers; it is supposed that section 122 was meant for another class of men, for whose benefit we do not concern ourselves.

This section has repeatedly come under consideration of the

courts of New York, and the views expressed above inflexibly adhered to. In Conkling *v.* Gandall, 1 Keys, 228, the plaintiff had declared under this section (sec. 120) of our code, on a promissory note made by Burdick & Finn, and indorsed by Gandall; gave the indorsement on the note by Gandall; said plaintiff was owner of note, and the same was due. Gandall demurred, because the petition did not state facts sufficient to charge him as indorser. There was no averment in petition that demand and notice had been made and given. Wright, J., delivered the opinion of the court. "This judgment (a judgment overruling the demurrer below and judgment against Gandall for amount of note), I think, can not be sustained. A complaint, under the code, must contain a plain and concise statement of the facts constituting a cause of action; and it may be demurred to if it does not. No cause of action was stated against the defendant, Gandall. The allegation affecting him is that he indorsed a promissory note for $256.58, made by the firm of Burdick & Finn, payable to his order, at the Bank of Fort Edward, four months after date, which the plaintiffs own and hold. This is not stating a cause of action against an indorser. The mere fact of indorsement of a negotiable promissory note gives no right of action or entitles the holder to recover of the indorser. . . . His contract is conditional, not absolute, and his liability depends on facts outside of the written instrument. He promises to pay only on condition that the holder shall present the note for payment; and, if payment is refused, notice shall be given to him at the time and in the manner required by law. . . . It is provided in section 162, chapter 5, of the code, entitled, 'general rules of pleading,' that in an action or defense, founded upon an instrument for the payment of money only, it shall be sufficient for the party to give a copy of the instrument, and to state that there is due him thereon from the adverse party a specified sum, which he claims. The precise intention of the legislature, or the framers of the code, by this provision, is not clear, but certainly it was not meant that a complaint should be good that merely set forth a copy of the instrument, with a statement that there was due to the plaintiff thereon from the person named as a defendant a specific sum, without averring that the defendant executed or delivered the instrument, or that it belonged to the plaintiff, or in any way averring the defendant's liability or the plaintiff's title. Such a mode of pleading would be so loose, vague, and indefinite that it is not to be assumed that the legisla-

ture intended to sanction it. This, however, would follow, if the clause is not to be read in connection with section 142, but construed alone and *strictly*. How are issues to be formed under such a complaint, or one dispensing with the requirements of section 142? Take the present case. The instrument is a promissory note; three parties are impleaded as defendants; a copy of the instrument is given, accompanied by a statement that there is due thereon from the persons named as defendants a specified sum, which the plaintiff claims, and there is nothing more. The defendants may interpose by answer a denial; but what issue or issues will be thereby framed? There is but a single fact alleged, and that in the most general form, upon which an issue can be taken, to wit, that there is due from defendants to the plaintiffs upon the instrument the sum named. By denying this, would it put in issue the making of the note by Burdick & Finn as copartners, and the the plaintiffs' title to it? Manifestly not. Nor did the pleader in this case so understand it. It is averred that Burdick & Finn made the note as copartners, a copy of which is set out; that the defendant Gandall indorsed, and that the plaintiffs are the owners and holders; all of which was unnecessary, if the provisions of section 142 are dispensed with by section 162, where the 'action is founded upon an instrument for the payment of money only.' Although the intended purpose of the last clause of section 162 is not clear, I am inclined to the opinion that it was meant that, where the action or defense was founded upon an instrument for the payment of money only, instead of setting forth the instrument according to its legal effect in the body of the complaint or answer, it should be sufficient for the party to give a copy of it. Be this, however, as it may, it is too improbable to suppose that it was intended in any class of actions that a complaint should be good that did not upon its face, either by direct averment, or by giving a copy of the instrument upon which the action was founded, with allegations connecting the parties with it, or unitedly showing a cause of action; or which did not contain material allegations to that end, or upon which issue might be taken; or, if not taken, judgment would legally pass against the impleaded parties by default. In this case, the instrument (a copy of which is given) purports to be for the payment of money, but without the averment that it was made by Burdick & Finn, named as defendants, as copartners, and the plaintiffs' title to it appears in some way (neither of which facts is to be implied from the instrument itself), there would be no statement of a cause of action by the

plaintiff against them. There is certainly no cause of action shown, where the facts upon which a plaintiff grounds his right to recover against a party whom he may choose to implead as a defendant do not affirmatively, or by implication, appear upon the face of the pleadings. . . . His promise is conditional, and his liability depends upon facts outside of the instrument on which his indorsement is made. An action as against him is founded on something more than an instrument for the payment of money only, even though it should be considered that section 162 of the code would embrace the makers of a promissory note, whose promise is contained in a civil contract, evidenced by the instrument itself. Payment of the note must be first properly demanded by the makers, and due notice given to the indorser, before any legal liability attaches to the latter. A complaint that does not aver facts, entitling the plaintiff to recover against a party, and they do not appear in the instrument set forth or to be implied therefrom, must be defective. If it be necessary, as against an indorser (which it unquestionably is), to establish his liability, to prove a demand of payment and notice of dishonor of the note, it is incumbent upon the pleader to state those facts, otherwise the cause of action is defectively stated.

"Whatever, therefore, may have been the legislative purpose in the enactment of section 162, it was not intended to include the case of a party whose liability was not absolutely fixed by and expressed in the instrument, but depended for its ever attaching on conditions precedent. Nor do I think in any case, even in that of the makers of a promissory note, the effect of section 162 is to dispense with the requirements of section 142. A complaint that did not cover the making of a promissory note, of which a copy is given by the persons sought to be charged as makers, nor showed that the plaintiff was the owner and holder, would, in my judgment, be bad on demurrer." There are two other cases in New York where this question has arisen: Prindle *v.* Caruthers, 15 N. Y. 425, and the case of Retelas *v.* Myers, 19 N. Y. 231. Neither of these cases raise the one decided above. The court held in these cases that the petition did state all the facts necessary to constitute a right of action, though Shankland, J., in Prindle *v.* Caruthers, *obiter dictum*, gives his construction of the code somewhat different from those of Wright, J., above cited. The case in 1 Keys, 228, cited above, is a later case than either of the others, and is the decision of the court, and not the dictum of a judge;

and hence that case is the law of New York. And it would seem to be the true construction, unless one part of the code is to be held to repeal another part, which is not a supposable case. This section can apply only to those cases where the instrument of writing is one which shows a liability of the defendant to the plaintiff. It can not apply to such instruments when indorsed or transferred, because the transfer must be averred; or, if the indorser is a party, then the facts must be alleged, which fix his liability as indorser. The language of our code requires expressly, what the court there say is necessary under the section stated, what a petition shall contain.

Where, says our code (sec. 122), others than the makers of a promissory note or the acceptors of a bill of exchange are parties in the action, it shall be necessary to state also the kind of liability of the several parties, and the facts, as they may be, which fix their liability. In case of indorsed notes or bills of exchange, where indorsers are parties, the averments must be made under the prior section, defining what a petition should contain; and the ordinary forms of petitions on promissory notes and bills of exchange against drawers and indorsers must be followed, if the pleader wishes to be certain that he is right. The other part of the section, which is substantially a copy of section 162 of the New York code, will be limited to accounts existing between the parties to the suit, and to notes and bills, which on their face show an existing liability of defendant to plaintiff. If the account has been assigned, then it will not show such a liability of defendant to plaintiff; because to show that, the assignment must be averred ere the title of plaintiff can appear. And such is clearly the meaning of our code. Section 123 of the Kansas code is an exact copy of ours, and will be subjected to the same construction. Kansas Stat. 1868, p. 652. The statute of Nebraska is also a copy of ours. Nebraska Stat. 1867, p. 414, sec. 129. These authorities and this reasoning apply to both of these statutes, as well as to ours and that of New York. The sterling good sense of Judge Wright's opinion will commend it to all thinking minds.

Our own court, in Black *v.* Chesser, 12 Ohio St. 621, has had this section under consideration. By the court: 1. To constitute an account, within the meaning of section 122 of the code, it is not necessary that the items be entered in an account-book, provided they are such as usually form the subject of book account. 2. In an action upon an account, it is sufficient giving a copy of the account, under that section of the code, for the plaintiff, without

previously making any entries in an account-book, to set down in writing, in the form of an account, the items thereof, and file it with his petition.

Sec. 121. This section provides that in pleading performance of conditions precedent in a contract, it shall be sufficient to state that the party has duly performed all the conditions on his part. This may be done in cases where there is no dispute as to the performance; but where there is a real dispute, the plaintiff will gain by specifically alleging it, as the defendant must then deny the specific allegation; whereas many a defendant will deny this averment of general performance, who will not that of the specific fact constituting the performance. In the one case, it may be a conclusion of law he is answering to, instead of a denial of the real fact; and so you would be compelled to try a case, in order to raise a legal question, which would have been raised on the record, if the plea had averred performance specifically. In all disputed cases, therefore, it is best to follow the common-sense view of putting on record the facts of your case.

This mode of declaring generally that the plaintiff has performed all conditions on his part to be performed was first introduced into England, and has thence been transferred into our pleadings. The English practice, under the statute, allowing such general pleading, is founded in good sense, and ought to be followed. If the petition sets out all the conditions contained in the contract, on which the action is founded, the defendant can deny that the plaintiff has performed any specific condition he may select; and this is all that is necessary in such a case. The condition is: on the record, the averment of its performance, and a denial of this averment as applied to the specific condition. But if the petition does not set forth the conditions in the contract specifically, then the defendant must answer setting up that by said agreement, it was provided so and so, as the condition may be, and then negative or deny that the plaintiff has performed that condition so recited. The case of Trott *v.* Smith, 10 M. & W. 453; S. C., 12 M. & W. 688, exhibits this mode of pleading, where the plaintiff does not insert in his declaration the conditions precedent. In this case, the declaration shows no conditions precedent whatever, and, therefore, contains no averment of all conditions precedent. It would seem that such an averment is only necessary when the declaration or petition shows such conditions. A party may declare

on a contract omitting the conditions subsequent or precedent, if he can make on paper a case without setting them forth. If he sets out the contract in words and figures, the conditions must be copied, if they are contained in the agreement itself, but if like conditions on a policy of insurance merely referred to, it may not be necessary. In the case of Mason *v.* Harvey, 20 Eng. L. & Eq. 541, the condition to an action on a fire-policy is set up in the plea, with an averment that plaintiff had not complied with and performed it. Even if the condition is stated in the declaration, the defendant may restate it in his plea and aver the non-performance on the part of the plaintiff. Graves *v.* Legg, 25 Eng. L. & Eq. 552; Glenn *v.* Leith, 22 Eng. L. & Eq. 489. *Vide* Oakley *v.* Morton, 11 N. Y. 30; Holmes *v.* Holmes, 9 N. Y. 525; Garvey *v.* Fowler, 4 Sandf. 665; Clarke *v.* Crandall, 27 Barb. 73.

Several Counts.

Under the old practice, a party could state his case in various forms, and under various aspects. But under the code all fictions are abolished, and parties are required to state the facts of their cases. A *fact* is defined to be a *thing done;* a reality, not a supposition; an *action*, a *deed.* All of these definitions call, and some of them emphatically, for the *truth.* The first edition of the code contained the same requisition, that the complaint should set forth a statement of the facts constituting the cause of action; and it also required that it should be verified; of course that statute called for a true statement; and the same phraseology used in a subsequent statute must have the same interpretation. Indeed, the *principal*, and I am constrained to say, almost, the *only beneficial* object of the legislature in adopting the code, was to abolish the use of fictitious allegations in our written pleadings; which had a tendency to mislead the parties, and embarrass those to whom the administration of the law was confided. Now, as there can be but one substantially true statement of a single cause of action, the practice of setting it forth in different counts is necessarily abolished. Per S. B. Strong, 10 Pr. 155.

The view above expressed has been confirmed since by the courts in this State and in New York. In Ferguson *v.* Gilbert, 16 Ohio St. 88, it was held that the plaintiff could not state the same cause of action in various ways. The code of civil procedure does not authorize the same cause of action to be stated in different forms as so many distinct causes of action. The court say: "Such a mode of pleading is unauthorized by the code; and it would have been

the duty of the court, on motion of either defendant to have ordered the second count to be stricken out, or to have required the plaintiff to elect upon which count she would proceed, and to strike out the other. Sturges *v.* Burton, 8 Ohio St. 215. But no objection seems to have been taken to the petition by motion or otherwise. . . . . The second cause of action adds nothing to the allegations of the first, and whilst it is, therefore, useless, it is at the same time, harmless, and may be regarded as mere surplusage." So where the complaint and prayer thereof are such as to embrace both equitable and legal remedies, the defendant may move the court to compel the party to elect on which part of the case he will proceed, or for which mode of trial or resulting relief he will go. Penn. Coal Co. *v.* Del. and Hud. Canal Co., 1 Keys, 72. It must be borne in mind that this was a case, where the facts as stated would have sustained an action at law or a bill in equity. It was not a case of two counts on separate causes of action. The party could have but one relief, while he had framed his petition so as to obtain either of two reliefs, one at law and the other in equity; hence he had to elect which remedy he would prefer, and adhere to that. The same doctrine is asserted in Comm'rs of Jackson Co. *v.* Hoaglin, 5 Kansas, 558. In this case the petition averred that the county board of Jackson county at divers and sundry times during the space of four or five years illegally issued county orders to the defendant, who drew the money on the same from the county treasury and converted the same to his own use: it was held that if the petition stated any cause of action, it states as many separate and distinct causes of action as there are separate and distinct conversions of the public funds; and that on motion plaintiff should have been required to separate the several causes in distinct counts, and if he refused to do it, the court could dismiss the action. The count in this case should have been a count for money had and received to and for the use of the plaintiff. Money obtained from another by fraud is still the money of the party defrauded, and is in law money of the party defrauded, had and received by the party so obtaining it for the use of the party defrauded. It would be well for lawyers, though there is a code, to study the scope and uses of common counts; in that case, many petitions would be much shorter than they are, and both lawyers and the court see more clearly what the real issue is. Whatever was a good count under the old practice is a good count under the code. The code definition of a petition is Chitty's and Gould's definition of a declaration; the substance in both cases is the same.

The reason for the various statements of the same cause of action grew out of the necessity of meeting a variance between the pleadings and the evidence. In cases of verbal contracts it is often impossible to anticipate what the evidence may literally prove. The plaintiff may have his understanding of the contract, but will the testimony sustain that understanding? Often no one can tell in advance; hence, where amendments could not be granted to meet a variance, the pleader had to frame his declaration in such a way to meet any possible variation in the evidence. So where the construction of a written contract was uncertain, the contract had to be set out to meet whatever view the court might take of the contract. And there are cases now, where such a right of stating the case would save both time and money. Variances would be anticipated and met in the petition. Now it is met by a motion to amend; but this may involve a continuance, or the payment of a large bill of costs. The party is in the power of the court exercising under the code a sort of imperial discretion in the matter of amendments; whereas, if the pleader could have been permitted to anticipate in his petition this possible variance in the evidence, he would have escaped the discretion of the court and the costs of a leave to amend. In my practice, I have seen cases of this character, where justice would have been better served by this right to state the cause of action in different forms, without injury to any one. It seems to those who do not understand the *reason* of the law, that this varied statement of a cause was purely arbitrary and unnecessary; whereas, the practice originated in sound reason, and was sanctioned by the courts in furtherance of justice. The discretion of a judge is somewhat uncertain in its action and variant in its application. No party should be left to the discretion of a judge, where, by any possibility of anticipation, it can be obviated. And most variances might be anticipated by the pleader in his petition if he was allowed to do it. The loose pleading under the code has increased the record of most cases more than double; this arises from not discriminating between *fact* and evidence. In many cases both the fact and the evidence will be set forth so as to render it difficult to tell how an issue should be framed on such a petition; and often you see a denial of the *evidence* rather than of the *fact*. But this is a question for the law-making power, and not for the courts.

Cases depending upon Principles in Equity.

The code changes the form of a bill to some extent. Discovery ceases to be any longer one of the objects of a court of equity; this object is now obtained by a direct examination of the parties to a suit. Hence this part of a petition must be omitted. With this must be omitted the exhibition, with the petition, of all papers, documents, and facts, which tend merely to prove the legal fact, or facts, on which the plaintiff's right to relief depends.

The petition will, therefore, contain only the facts on which the right to relief depends. It will be what the stating portion of an old bill in chancery was; but the petition must sometimes go farther, and anticipate a defense, by showing facts which are an answer to such defense. On a parol contract to convey land, the petition must anticipate a plea of the statute of frauds, by showing acts amounting to a part performance. So, also, the petition must anticipate a defense growing out of a lapse of time, and probably one founded on the positive provisions of the statute of limitations. So, also, a defense of infancy must be anticipated, and the petition must show the facts that avoid it. In other words, the whole case must be stated. If an account has been stated, a petition for an account will not lie; a plea of the account stated will be a bar. The stated account must be the basis of the petition; it must state that as a fact, and proceed to show that it was obtained by fraud, or that there are mistakes in it, by including what ought not to have been included, or by omitting what ought to have been included. So, if a release has been given, it should be attacked and got rid of in the petition, so that the way will be left open for relief on the cause of action so released. These are familiar principles in pleadings in equity, and the code has not interfered with them. The case is still to be stated, and how shall it be done, except in the method heretofore held necessary? These are the *facts* which the law requires to be stated, and they must be stated now just as clearly as before.

The code says that each cause of action must be separately stated. This can not apply to pleadings in chancery. There may be several grounds of relief growing out of the same facts. Has every one to be stated separately, in a separate count, as is the case in an action at law? Then there will be no end to chancery pleadings, if all the facts have to be restated just as often as there are separate grounds of relief. The thing is absurd; call the bill a petition if you will, but in heaven's name exercise common sense, in stating

your case in such a form as the wisdom of a large experience has devised to be the most appropriate. The case must still be stated, as it ever was, all in one single statement; and Midford, Cooper, and Story must be your guides in learning when the thing is right, and when not. There is no other method by which the pleader can be certain that he is right, and there is no other method by which the statement can be made as briefly and intelligently.

These views have since been confirmed by the decisions of the courts. The inherent, irreconcilable difference between suits at law and bills in chancery is recognized in the code, and can not be obliterated from it. Selden, J., ably discusses this question in the case of Reubens *v.* Joel, 13 N. Y. 488, 493. "What are the distinctions," he says, "between actions at law and suits in equity? The most marked distinction obviously consists in their different modes of relief. In the one, with a few isolated exceptions, relief is invariably administered, and can only be administered, in the form of a pecuniary compensation in damages for the injury received; in the other, the court has a discretionary power to adapt the relief to the circumstances of the case. By what process can these two modes of relief be made identical? It is possible to abolish one or the other, or both, but it certainly is not possible to abolish the distinction between them. The legislature may, unless prohibited by the constitution, enact that no court shall hereafter have power to grant any relief, except in the form of damages, and thereby abolish all suits in equity; or that all courts shall have power to mold relief to suit the particular case, and thereby virtually abolish actions at law as a distinct class. To illustrate by a single case; they may provide that where a vendor of land, who has contracted to sell and received the purchase money, refuses to convey, the vendee shall have no remedy but an action for damages, or, on the other hand, that he shall be confined to a suit for a specific performance; but it is clearly beyond the reach of their powers to make these two remedies the same. Another leading distinction between common-law actions and suits in equity consists in their different modes of trial. The former are to be tried by a jury, the latter by the court. Can the legislature abolish this distinction? They might but for the restraints of the constitution abolish either kind of trial, or reclassify the classes to which they apply; but they can not make trial by jury and trial by court the same thing. It is plain that the only way in which the declaration contained in section 69, that 'there shall be in this State hereafter but one form of action for the enforce-

ment or protection of private rights and the redress of private wrongs,' can be made good, is by abolishing both the form of trial and the mode of relief in one or the other of the two classes of actions. When this is done, and not till then, shall we have one homogeneous form of action for all cases.

"It is, in my judgement, clear that the legislature has not the constitutional power to reduce all actions to one homogeneous form; because it could only be done by abolishing trial by jury, with its inseparable accompaniment—compensation in damages—which would not only conflict with article 1, section 2, which preserves trial by jury, but would, in effect, subvert all jurisdiction at law, as all actions would thereby be rendered equitable; or by abolishing trial by the court with its appropriate incident—specific relief—which would destroy all equity jurisdiction, and convert every suit into an action at law.

"Instead of being abolished, the essential distinctions between actions at law and suits in equity are by these sections expressly preserved. Actions at law are to be tried by a jury, suits in equity by the court. Damages are to be given, as heretofore, in the former, and specific relief in the latter.

"The same distinction is kept up in the provisions in regard to costs. In the cases mentioned in section 304, which are actions at law, costs are allowed of course; while in other actions, that is, in equity suits, they rest by virtue of section 306, as formerly, in the discretion of the court.

"As section 69, therefore, is plainly in conflict, not only with the constitution, but with the subsequent provisions of the code itself, it can not aid us in putting the proper construction upon section 219.

"It becomes necessary, then, to construe the latter section by itself; and if we carefully scrutinize its provisions, it will be found to bear upon its face unmistakable evidence of a discrimination by the legislature, in its enactment, between actions at law and suits in equity. The first branch of the section plainly applies to the latter class of actions exclusively. It provides that, when the relief demanded in the complaint 'consists in restraining the commission or continuance of some act,' or where, during the litigation, it shall appear that the defendant is doing or threatens to do some act in violation of the plaintiff's rights respecting the subject of the action, a temporary injunction may be granted. Now it is manifest that this provision can only apply to suits in equity, or to

suits made triable by the court, which is the same thing. The terms used incontrovertibly establish this."

It will thus be seen that the distinction between actions at law and suits in equity is recognized in the constitution, in our general legislation, and in the code itself. It is, therefore, impossible to disregard this fundamental distinction; we must recognize and act upon its existence.

Such being the case, the pleadings in the two classes of cases can not be contracted into the same mold, but each must correspond with the nature of the case, and the modes heretofore adopted to obtain relief in either class of cases. Actions of equity must continue to be what they were before substantially, and actions at law what they were before the code; and the pleadings in each class of cases must follow substantially, in the one case, the common-law declaration, in the other an old bill in chancery. If this construction is not to be given to the code, if there is but one form of stating a cause of action, what is that form to be? Indeed, different common-law actions can not be stated alike in the petition. An action on a note can not be stated like the petition against a railroad for negligently injuring a party. Hence, petitions in equity must be framed according to the law of equity, and not according to the law governing common-law actions. We must look to works on pleadings in equity in the one case, and to works of pleading in actions at law in the other. And such is the universal practice; a petition in a suit in equity is now substantially what in Ohio was formerly a bill in chancery; and it must be so, if we are to obtain equitable relief. To obtain that relief, we must state in the petition a case, the facts, which justify the granting of that relief. The old bill in chancery was framed on that principle, and under the code, we must follow those forms, if we are to obtain the like relief.

The plaintiff must make his case in his petition, and he must succeed or fail on that state of facts. So, where a party filed a petition against his debtor and trustee to obtain a benefit under an assignment in trust for creditors, it was held that he could not recover on the ground that the assignment was fraudulent and void. "It is a rule in chancery," says Wright, J., "not affected by the code, that a party must recover according to the case made by his complaint, or not at all; *secundem allegata*, as well as *probata*. No decree can be made in favor of a plaintiff on grounds not stated in his complaint, nor relief granted for matters not charged, although they may be apparent from some part of the pleadings and

evidence. Kelsey *v.* Western, 2 Comst. 506; Ferguson *v.* Ferguson, 2 Ib. 160; Bailey *v.* Rider, 6 Seld. 363; Thomas *v.* Carter, 4 Barb. 265; New York Prot. Ins. Co. *v.* Nat. Ins. Co., 20 Barb. 473. If it be as is claimed, that the deed was void as against the plaintiff's judgment, for the reason that it was a conveyance by Mrs. Eames of her property in trust for her own use, or that it was made to hinder, delay, and defraud her creditors, these matters should have been alleged. Not being alleged in the pleading, no proof of them could properly be received, or no judgment predicated upon them. Chautauqua County Bank *v.* White, 2 Seld. 236; Bailey *v.* Rider, *supra*. Most clearly, when a party claims the benefit of a trust conveyance, treating it as valid in his complaint, and nowhere seeking to impeach it, he is not entitled to any relief on the ground that it is void or fraudulent, or intended to defraud creditors; and this is so although it may appear to be fraudulent or void on the pleadings and evidence. Ontario Bank *v.* Root, 3 Paige, 478. This doctrine is in harmony with the law as it now exists, the code providing that 'the relief granted to the plaintiff, if there be no answer, can not exceed that which he shall have demanded in his complaint; but in any other case, the court may grant him any relief consistent with the case made by the complaint, and embraced within the issue.' In the present case, the only relief that could have been granted 'consistent with the complaint and embraced within the issue,' was to direct the payment of the plaintiff's judgment by the trustee as being a debt provided for in the trust deed itself. A decree setting aside the deed on the ground that is was fraudulent or void against the plaintiff, that they might subject the property in the hands of the defendant, Kirkland, to the payment of the judgment, would have been utterly inconsistent with the case made by the complaint, and wholly without any issue raised by the pleadings."

This case recognizes the importance of stating the case correctly in the petition; the same importance is attached to it now as there was under the former practice in chancery. The plaintiff must state his case as it will turn out in evidence, because he can not set out one case and prove and recover on another. When a variance springs up out of the evidence, it can only be obviated by an amendment, with the delay and costs incident to it.

The Prayer or Demand for Relief.

If the demand be for money only, the amount thereof should be stated; and if interest thereon is claimed, the time from which it is to be computed must also be stated. In actions, then, for the recovery of money, there are two classes: one where a *sum certain, with interest*, is demanded; and the other where the sum is uncertain, to be found by the court or a jury. In the first class is embraced all those cases where the affidavit goes to the truth of the amount demanded. The verification applies to the sum stated, only in actions *founded on contracts, express or implied, for the payment of money only.* The cause of action, then, must be founded on *contract*, and not only on contract, but on a contract for the payment of money only. This language is substantially the same as that employed in section 122.

What, then, is a contract for the payment of money only? We suppose it is one where an averment of the non-payment of the money is all that the breach is necessary to show a right to recover. If the petition must contain any statement, except those of a legal liability to pay a sum of money, and the non-payment of it, then it is not a contract for the payment of money only. An action on a warranty in a deed, for the loss of goods by common carrier, for the recovery of money on the rescission of a contract, can not be included in this class; for though the rule of damages is certain, still it has to be assessed as damages. The exact sum, then, must be stated in all cases, where an *indebitatus* count in debt would lie, on all notes, bills, etc., whereby the maker binds himself to pay a sum certain of money. In these cases, the prayer must state the exact sum due, and the exact time from which interest is payable. In other words, he must state the facts, so that, on a default for answer, the court can, by an inspection of his petition, calculate the amount for which judgment is to be rendered; as in such case the plaintiff is entitled without evidence to the sum and interest thereon, as he demands.

In all other cases the sum to be stated may be any sum which will be sufficient to cover what the plaintiff claims. In other words, in these cases, the amount claimed should be stated as *damages;* in the other, as a *debt.*

It is very important to keep up this distinction; otherwise, parties may be making oaths to sums, to the exact truth of which they never dreamed of affirming on oath; or, in other cases, parties

may be in difficulty in laying their damages too low, through fear of being sworn to the truth of the amount.

In real actions the prayer will be for the recovery of the land and damages, if they are claimed. So in replevin, the prayer must be for a return of the property and damages for its detention.

In cases founded on principles of equity, the prayer must demand the specific relief the party is entitled to. There is here no general prayer broad enough to cover any relief the case will justify; the plaintiff must forecast his relief, and be sure to do it right, unless he can be sure of leave to amend; and that hangs upon the *discretion* of a judge.

Claims, both for legal and equitable relief, may be united in one action, where they grow out of the same transaction, but not otherwise. Getty *v.* H. Riv. R. R. Co., 6 How. Pr. 269; New York Ice Co. *v.* Northwestern Ins. Co., 23 N. Y. 357; S. C., 21 How. Pr. 296; 12 Abb. 414; Bidwell *v.* Astor Mutual Ins. Co., 16 N. Y. 263; Lamoreux *v.* Atlantic Mutual Ins. Co., 3 Duer, 680; Wandle *v.* Turney, 5 Duer, 661. Where they are not inconsistent with each other: Linden *v.* Fritz, 3 Code, 165; S. C., 5 Sandf. 668; Trull *v.* Granger, 8 N. Y. 4. To demand judgment for forfeiture of a lease, and that the defendant be restrained by injunction from repairing the demised premises, is inconsistent. Linden *v.* Fritz, *supra.* And so of a demand for relief and a demand of judgment for a specific sum. Durant *v.* Gardner, 10 Abb. 445; S. C., 19 How. Pr. 94. Alternative equitable relief may be prayed for and obtained now as heretofore. Linden *v.* Fritz, *supra;* Young *v.* Edwards, 11 How. Pr. 201. But it is improper to unite in one complaint prayers for relief against the defendant, individually and in his capacity of executor. McMahon *v.* Allen, 1 Hilt. 103; S. C., 3 Abb. 89. An objection to the relief prayed for should be taken by motion. Durant *v.* Gardner, 10 Abb. 445; Recost *v.* Townsend, 6 How. Pr. 460, 463; Walton *v.* Walton, 32 Barb. 203; 20 How. Pr. 347. The plaintiff may demand any kind of relief to which he supposes himself entitled, and he is not confined to one kind of relief. Hall *v.* Hall, 38 How. Pr. 97. But a prayer for damages, exclusively, prevents a judgment for specific performance, notwithstanding the complaint contains facts sufficient to warrant it. Ryder *v.* Jenney, 2 Rob. 56, 65. And where the complaint prayed judgment for a sum of money, and the relief to which it appeared the plaintiff was entitled, was to compel the defendant to account for a trust fund, judgment was given for the defendant. Bishop *v.* Houghton, 1 E. D. Smith, 566; Hoitt *v.* Harvey, 21 How. Pr. 382; S. C.,

13 Abb. 332. When a complaint prayed that a deed might be set aside, and also for such other and further relief as may be agreeable to equity and good conscience, it was held that, although the deed could not be set aside, yet, under the general prayer, the court might allow its reformation. Grafton *v.* Remson, 16 How. Pr. 32. A prayer for a judgment of the amount claimed can not be united in the same complaint with one for a judicial determination on the validity of an assignment of property made by the defendant. Reubens *v.* Joel, 13 N. Y. 488; S. C., 2 Duer, 530. But if the defendant answers, the demand for relief in the complaint becomes immaterial. Marquat *v.* Marquat, 12 N. Y. 336; Emery *v.* Pease, 20 N. Y. 62. Yet, when the summons and demand of relief in the complaint is for a remedy at law only, it renders equitable relief so far inconsistent with the case made by the complaint as to prevent the plaintiff having equitable relief, although upon the evidence he might have maintained an action for such relief. Towle *v.* Jones, 1 Rob. 87; S. C., 19 Abb. 449; Ryder *v.* Jenney, 2 Rob. 56, 65.

These authorities show that the pleader must take great care in framing his petition; and, if his case present a case for either one of two remedies or reliefs, he must decide whether he will go for relief at law or in equity, and that he is bound to the specific relief demanded. This is reasonable. A party should not—can not be permitted to make up an issue in a legal action, and failing in that, be permitted to take a decree for equitable relief, because he might originally have obtained relief in that aspect of the case.

Objection to the relief demanded must be taken by motion. Durant *v.* Gardner, 10 Abb. 445; S. C., 19 How. Pr. 94; Moses *v.* Walker, 2 Hilt. 536; Walton *v.* Walton, 20 How. Pr. 347; Redmond *v* Dana, 3 Bosw. 615; Andrews *v.* Shaffer, 12 How. Pr. 441; People *v.* Mayor of New York, 28 Barb. 240; 17 How Pr. 56; 8 Abb. 7; Hartford *v.* Bennett, 18 Ohio St. 441; Bass *v.* Comstock, 38 N. Y. 21.

The Statement of more than one Cause of Action.

Each cause of action must be separately stated. This rule precludes duplicity. Each count must be complete and distinct; and, if two causes of action, in a case at law, are blended in one statement, it is bad on demurrer under our code, which has itself required this distinct statement to be made. *Duplicity* is a direct violation of the code. Such a complaint presents an illegal look on its face, and hence must be held bad by the court. And such

are the last decisions in New York, though there has been much conflict in the cases. Van Namee *v.* People, 9 Pr. 198; Straus *v.* Parker, 9 Pr. 342. Some courts in that State hold it must be reached on motion; but the Court of Appeals, in Cahoon *v.* Bank of Utica, 3 Selden, 486, recognized this practice. The question in that case was one of duplicity, raised on demurrer; and no objection being taken to the practice, the court proceeded to decide the case, affirming the judgment below. Whereas, if the question could not have been raised on demurrer, then the demurrer was a nullity, and the judgment one by default, thus presenting no question for the Court of Appeals. But the court proceeded to decide the case, on the ground that the judgment must be reversed, if the petition contained two causes of action in a single count. The dissenting opinion of Jewett, J., shows this to have been the understanding of the court. The necessity of having each stated by itself in a different count is as imperative, under the code, as under the former practice. By stating each separately, confusion is avoided, a definite issue can be framed on each cause of action, and it can be more conveniently tried. There should be as many *separate statements* as there are causes of action. Such is the language of Jewett, J., in which the majority of the court must have agreed, since they were forced to hold that there was in fact but one cause of action stated in the petition, and that was a cause of action founded on principles of equity. This case, therefore, seems to settle what is good sense, that a petition drafted right in the teeth of the code should be held bad on demurrer. The other cases on this question will be found under the head of demurrer.

The old rules of pleading as to duplicity are just as important, then, as ever. The separate statement of a cause of action, says Jewett, J., and the separate counts of a declaration, are equivalent expressions. We must go, then, to the works on pleading in common-law actions, and to similar works on pleadings in chancery, to ascertain what is or what is not duplicity. Duplicity at law is different from what it is in chancery. At law there may be two causes of action growing out of the same facts, yet each must be separately stated; while in equity the whole case may be stated, and each of the grounds of recovery, and if either or all are found to be proved, the plaintiff is entitled to recover. This is not duplicity or multifariousness in equity pleading. There is here but one case, though a recovery may be predicated on various grounds. As where a deed is sought to be set aside, the

plaintiff may allege that he was an infant at the time, that it was obtained by misrepresentation, was without consideration, though one was supposed to have been received. In other words, the deed is the thing in question, and he may state all the grounds, however numerous, on which he rests his claim to relief. At law he would have to state each of these grounds in a separate count, as each of them would constitute a separate cause of action; and unless cases depending upon equitable principles are to be governed as heretofore in courts of equity, each of these grounds must be separately stated, since, abstractly and strictly considered, each one of them constitutes a cause of action. But it is supposed that cases depending on principles of equity are to be stated by Midford, Cooper, and Story, and not by Chitty and Gould and Stevens. Unless this is the case it will be impossible to administer the law as recognized in courts of equity under the code. Fully aware of this difficulty, from a two years' experience under the code, as well as from the evidence of its workings in the decisions of New York, we have all through claimed that this distinction must be kept up; facts in each class of cases must be stated according to the law formerly governing the jurisdiction to which they respectively appertained. Such, too, we believe, is the general opinion with the intelligent portion of the profession.

CHAPTER XI.

DEMURRER.

SEC. 87. The defendant may demur to the petition only when it appears on its face, either:

1. That the court has no jurisdiction of the person of the defendant, or the subject of the action.

2. That the plaintiff has not legal capacity to sue.

3. That there is another action pending between the same parties for the same cause.

4. That there is a defect of parties, plaintiff or defendant.

5. That several causes of action are improperly joined.

6. That the petition does not state facts sufficient to constitute a cause of action.

SEC. 88. The demurrer shall specify distinctly the grounds of objection to the petition. Unless it do so, it shall be regarded as objecting only, that the petition does not state facts sufficient to constitute a cause of action.

SEC. 89. When any of the defects enumerated in section 87 do not appear upon the face of the petition, the objection may be taken by answer; and if no objection be taken either by demurrer or answer, the defendant shall be deemed to have waived the same, except only the objection to the jurisdiction of the court, and that the petition does not state facts sufficient to constitute a cause of action.

SEC. 90. When a demurrer is sustained on the ground of misjoinder of several causes of action, the court, on motion of the plaintiff, shall allow him, with or without costs, in its discretion, to file several petitions, each including such of said causes of action as might have been joined; and an action shall be docketed for each of said petitions, and the same shall be proceeded in without further service.

SEC. 91. The defendant may demur to one or more of the several causes of action stated in the petition, and answer as to residue. 2 S. & C. 973; 6 Ohio St. 473, 607, 611; 7 Ib. 239.

The above are the provisions of the code in regard to demurrers to the petition. The grounds of demurrer are pointed out in the various subdivisions of section 87. But it is first to be remarked that all the defects here enumerated must appear on the face of the petition, in order that the objection can be made by demurrer; as is manifest by the office of a demurrer, and also from the language of section 89. Burrows *v.* Miller, 5 Pr. 51. If the objection does not appear on the face of the petition, the fact necessary to raise the question may be set up in the answer. Hornfager *v.* Hornfager, 1 Code, N. S. 412.

The next observation of a general character is, that every demurrer must be special, and set out some one of the causes enumerated in the said section 87. Every objection, save that of jurisdiction, is waived unless specifically stated in the demurrer. Such is the purport of section 88; for it provides that all general demurrers shall be considered as demurrers only for the cause stated in subdivision 6, that the petition does not state facts sufficient to constitute a cause of action. Hind *v.* Tweedle et al., 7 Pr. 278.

The specification is definite enough, if it states one of the causes enumerated in the section and in the language of the subdivision.

On this point, there has been some conflict of opinion in New York, though the weight of authority is in favor of this view of the code. Swift *v.* De Witt, 3 Pr. 280–284; Durkee *v.* Saratoga & Wash. R. R. Co., 4 Pr. 226; Hyde *v.* Conrad, 5 Pr. 112; Noxon *v.* Bentley, 7 Pr. 316. Hand, J., says: "I know it has been doubted whether a general demurrer is now available; but where no valid cause of action is alleged, I have no doubt it is fatal in every stage of the proceeding in which the question can properly arise." Our code, in section 88, provides, in fact, for a general demurrer, on the ground stated in subdivision 6. In this respect it differs from the New York code.

A demurrer may be to the whole petition, or to any one of the causes of action stated in it. Sec. 91. And if the demurrer be to the whole of a petition, containing several causes of action, it must be overruled, if either one of the causes of action is sufficient. Cooper *v.* Clason, 1 Code, N. S. 347; 1 Denio, 414.

The demurrer must state to what part of the petition it is intended to object, where the petition contains more than one count; so it may be filed to a part of the causes of action stated, while an answer may be put in as to the other; but both a demurrer and an answer can not be put in to the same matter. The answer would be held to overrule the demurrer.

A demurrer is only proper where the ground of it appears on the face of the complaint. Getty *v.* Hudson River R. R. Co., 8 How. Pr. 177; Wilson *v.* Mayor of New York, 15 How. Pr. 500; S. C., 6 Abb. 6; 4 E. D. Smith, 675; Coe *v.* Beckwith, 31 Barb. 339; S. C., 19 How. Pr. 398; 10 Abb. 296.

A demurrer admits all relevant facts that are well pleaded, but not conclusions of law. Hall *v.* Bartlett, 9 Barb. 297; Acome *v.* Am. Min. Co., 11 How. Pr. 24. A demurrer continuing upon the record is an admission of the facts stated in the pleading, not only for the purpose of argument, but as evidence on the trial. Cutler *v.* Wright, 22 N. Y. 472. The demurrer in this case had been overruled, and not withdrawn. No rejoinder, then, became necessary to a reply, but it was taken as denied; this demurrer overruled and not withdrawn, seems to have been held to admit the truth of reply, though no denial to it was required. I should say that, the demurrer overruled, the reply stood as if it had never been interposed. It was not the object of the demurrer to admit the truth of the reply, but to test its legal sufficiency; its legal sufficiency having been sustained, then the question came up on the statutory denial of its truth. I think the reasoning of the

court is inconclusive and unsatisfactory. Under our present practice, that a party can save a question raised on the pleadings, though he answer or reply over, no such question can arise, when the party excepts to the ruling of the court in sustaining the demurrer. Davies, J., says: "Section 155 of the code provides that, if a reply of the plaintiff to any defense set up by the answer of the defendant be insufficient, the defendant may demur thereto, and shall state the grounds thereof. By section 168 of the code, as it stood in 1851, every material allegation of new matter in the answer, not specifically controverted by the reply, shall, for the purposes of the action, be taken as true. But the allegation of new matter in a reply shall not, in any respect, conclude the defendant, who may, on the trial, countervail it by proofs, either in direct denial or by way of avoidance. When, therefore, new matter was set up in a reply under section 153, the defendant had two ways to meet it. First, if he deemed it insufficient to avoid the defense interposed by him, he could demur thereto as authorized by section 155; and if he wished to controvert the facts so set up, he was not concluded by them on the trial, but the plaintiff would be left to prove them, and the defendant would then be at liberty to countervail them by proofs, either in direct denial or by way of avoidance. If he elected to admit the facts stated in the reply, and claim that they were insufficient in law to repel the defense interposed by him, the means of doing that were provided by section 155. . . . The defendant in this case elected to rely upon the rights secured to him by section 155, and interposed a demurrer. It is well settled that a demurrer admits the facts pleaded, and merely refers the question of their legal sufficiency to the decision of the court. 1 Chit. Pl. 700. After judgment passed for the plaintiff on the demurrer, no further issue of fact remained to be tried as to the matter set up in the pleading demurred to."

The error in this reasoning lies in this: Under the old practice a reply had to be met by a rejoinder, either denying its truth or avoiding its effect by new matter. If, then, a demurrer was overruled to a declaration, plea, or reply, the petition, answer, or reply was taken to be true, unless met by a denial on the part of the adverse party. But under the code no rejoinder was required; the reply was held to be denied. When, therefore, the demurrer was overruled, the statute creates the denial and supplies the avoidance without any pleading whatever. The demurrer is resorted to, not as a pleading of facts, but as a pleading asking the court if, admitting the facts to be true, they are in law sufficient to avoid

the defense set up in the answer; for the purpose of settling that legal proposition, the facts are taken to be true: but that question settled, as to their legal sufficiency, then comes up the truth of the reply on the statutory rejoinder without pleading. Under the old practice, if the party did not reply over, after the overruling of a demurrer, the facts were taken to be true, not because of the demurrer, but because no rejoinder was interposed denying or avoiding the reply. So now, when a demurrer to a petition or answer is overruled, the case stands on default, and judgment is rendered, not on the admission of the demurrer, but on the failure of the party to answer or reply. It will thus be seen that this reasoning of Judge Davies does not apply to the overruling of a demurrer to a reply, since without further plea there is not default. Final judgment might be given on a demurrer if the party did not obtain leave to plead over. If he did not do that, the case stood admitted without regard to the demurrer. In my opinion, therefore, when a demurrer to a reply is overruled, the case stands for trial, as though no demurrer had been interposed. If this is not the case, and the court refuse leave to withdraw the demurrer, the party is concluded when his object was to test, not the *truth*, but the *sufficiency* of the reply. Section 136 of Ohio code provides that "upon a demurrer being overruled, the party who demurred may answer or reply if the court is satisfied that he has a meritorious claim or defense, and did not demur for delay." It will thus be seen that in such a case the party is in the power of the court, the court being satisfied he has a *meritorious* claim or defense. How is the court to ascertain this? Is it to try the case in advance? It must, if it is to be satisfied of such a claim or defense. It is not, therefore, safe to demur to a reply. In our practice, a demurrer is merely for the purpose of testing the law of the reply; but under this New York ruling, the party safely for himself can not demur: he must raise his legal proposition by objecting to the admission of any evidence under the reply, because in law it is no defense, if proved. This practice is admissible, and under such a holding the only safe one for the party.

A demurrer must be neither to a part of an entire cause of action, nor a paragraph, for a part of a pleading can not be expunged on demurrer unless it amounts to a separate cause of action, and is so stated. Lord *v.* Vreeland, 15 Abb. 122; S. C., 24 How. Pr. 316.

Where the complaint contains in form but one cause of action, but sets forth facts constituting two or more causes of action, the remedy is not by demurrer, but by a motion either to strike out

all but one cause of action, or to compel the plaintiff to elect on which he will proceed. Cheney *v.* Fisk, 22 How. Pr. 236. In such case, if one of the causes of action can not be sustained for want of proper parties defendant, it should be treated as irrelevant or immaterial Lord *v.* Vreeland, 24 How. Pr. 316; S. C., 15 Abb. 122; 13 Abb. 195.

Where the complaint prays for relief beyond what the facts alleged therein authorize, the remedy is not by a demurrer, but by a motion to strike out such parts of the prayer as are not thus authorized. Lord *v.* Vreeland, 13 Abb. 195; Roeder *v.* Ormsby, 13 Ib. 334; S. C., 22 How. Pr. 270. And when the special damages claimed are not distinctly and definitely set forth, the remedy is by motion and not by demurrer. Hewit *v.* Mason, 24 Ib. 366.

So a demurrer will not be sustained to an answer to a petition seeking equitable relief which modifies the plaintiff's right to relief, or entitling the defendant to any counter relief which he asks for. 18 Ohio St. 490.

One party can not demur to a petition on the ground that another party has been improperly joined with him as a defendant. Weightman *v.* Bumcratz, 12 Ohio St. 273.

A pleading under the code, which sets up two or more causes of action, or two or more defenses, but omits to separately state and number them, is not for that reason demurrable. The irregularity can only be reached by motion. Hartford *v.* Bennett, 10 Ohio St. 441; S. P., Bass *v.* Comstock, 38 N. Y. 21. Nor is the omission to state distinct causes of action, which may be joined in separate counts, a misjoinder of action under the code so as to be reached on demurrer. Bass *v.* Comstock, *supra.*

Where a complaint may reasonably show the averment of a good cause of action, it is not to be held bad on demurrer because its language is susceptible of a construction excluding any such cause. The court will adopt a rational construction rather than one which makes the complaint an absurdity. Olcott *v.* Carroll, 39 N. Y. 436. Woodruff, J.: "The language is clearly susceptible of this interpretation; and if so, that interpretation should be given in preference to one which leads to the absurdity of construing the complaint as an averment that the defendant has received moneys exclusively his own, in which the plaintiff had no interest. If the allegation admits of the latter interpretation, it may be said to be ambiguous, and that is all.

"It is not true that, under the code, if there be uncertainty in respect to the nature of the charge, it is to be construed strictly

against the pleader. By section 159, in the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed with a view to substantial justice. And by section 160, when the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge is not apparent, the court may require the pleading to be made definite and certain by amendment." It would, therefore, seem that if neither court nor opposite party objected to a pleading as uncertain and indefinite, a court of error should give such a construction to the pleading as will sustain the judgment.

A demurrer may assign as many grounds of demurrer as the pleader may desire. Harrison *v.* Hogg, 2 Ves. 323; Jones *v.* Frost, 3 Madd. 1. So he may file as many separate demurrers to separate and distinct portions of the complaint, answer, or reply. as there are separate causes of action or defenses or reply. In such case each demurrer must be decided by itself. 1 Barb. Ch. 107.

So a demurrer must state the specific objections which the pleader has to the pleadings, but the grounds of demurrer may be stated in the language of this section relating to demurrers. Viburt *v.* Frost, 3 Abb. 120; Hobart *v.* Frost, 5 Duer, 672. All objections to the pleading, except those specified in the demurrer, are waived. Malone *v.* Stillwell, 15 Abb. 421; Nellis *v.* De Forrest, 16 Barb. 61; Conn. Bank *v.* Smith, 9 Abb. 168; S. C., 17 How. 487.

When a demurrer does not go to the whole complaint, it must distinctly point out the part it is intended to cover. Jarvis *v.* Palmer, 11 Paige, 650; Stuyvesant *v.* Mayor, etc., of New York, 11 Ib. 415; Kuypers *v.* Reformed Dutch Church, 6 Paige, 570. When a demurrer purports in its commencement to be a demurrer to the whole answer, but afterward distinctly sets forth that part of the answer to which it was to apply, it was held that in effect the demurrer was only to the part pointed out, and not to the whole pleading. Matthews *v.* Beach, 8 N. Y. 173.

When the demurrer is to several causes of action or defense, and one of them is good, the demurrer must be overruled, as it must be wholly sustained or fail altogether. Separate demurrer should be plead to each count. Peabody *v.* Wash. Mut. Ins. Co., 20 Barb. 339; People *v.* Mayor, etc., of New York, 17 How. Pr. 57; S. C., 28 Barb. 240. When the complaint showed a separate cause of action against each defendant, but not a joint one, a joint demurrer was sustained. Hess *v.* B. & N. Falls R. R. Co., 29 Barb. 391. So where in an equity suit the petition shows a cause of action against a part of the defendants, and not as to the others, the latter may

demur. Eldridge *v.* Bell, 12 How. Pr. 547; Phillips *v.* Hagadon, 12 Ib. 17. A joint demurrer will lie for the misjoinder of parties plaintiff, in the non-joinder of the proper parties defendant, but not for the misjoinder of parties defendant. Brownson *v.* Gifford, 8 How. Pr. 389, 396, 397; Woodbury *v.* Sackrider, 2 Abb. 402; Emery *v.* Pease, 20 N. Y. 62. Upon a general demurrer to an answer containing several distinct grounds of defense, the demurrer may be overruled if either one of the defenses are sufficient to bar the action. Shroyer *v.* Richmond & Staley, 16 Ohio St. 455.

Where a demurrer and answer are filed to the same pleading, the pleader should be put to elect which defense he will abide by. Davis *v.* Hines, 6 Ohio St. 473. Does not an answer waive the benefit of a demurrer filed before or at same time? Such was the old practice, and there is no reason why it should not be now applied. An answer to the merits admits that there is no ground for a demurrer. The answer is inconsistent with the demurrer, and in fact overrules it.

Subdivisions 1 *and* 2.—The grounds here stated need no illustration as a question of pleading or practice. In New York it has been decided that where one sues as administrator he need not make proferts of his letters of administration; it is enough that his representative character is stated in his petition. Willis Ex'r *v.* Webster, 9 Pr. 251.

"That the court has no jurisdiction of the person," means that the person is not subject to the jurisdiction of the court; not that the suit has been irregularly commenced. Nones *v.* Hope Mut. Life Ins. Co., 5 How. 96; S. C., 3 Code, 161; 8 Barb. 541. An objection to the jurisdiction of the court can only be taken by demurrer when that defect appears on the face of the petition. Wilson *v.* Mayor, etc., of New York, 6 Abb. 6; S. C., 15 How. 500; Roenig *v.* Nott, 8 Abb. 6; S. C., 2 Hilt. 323.

The capacity of the plaintiff to sue is independent of the facts constituting the cause of action; therefore, that question can not be raised by demurrer under the sixth subdivision. Bank of Louisville *v.* Edwards, 11 How. 216; Myers *v.* Machado, 6 Abb. 198; S. C., 14 How. 149; Hobart *v.* Frost, 5 Duer, 672.

When the plaintiff sues by a name representing no person, natural or artificial, the objection must be raised by motion, not by demurrer. Bank of Havana *v.* Magee, 20 N. Y. 355. In this case, Cook did a banking business in the name of the Bank of Havana. No objection was made by answer; the case was tried, and on the

trial the fact came out. The court held this objection could not be reached by demurrer, but should have been by motion or answer, and that the court ought to have on the trial amended the record by inserting Cook's name. Where a petition by a corporation omits to allege facts showing the plaintiff's capacity, and the defendant demurs for the sole cause that the complaint does not state facts sufficient to constitute a cause of action, he can not avail himself of the objection that the plaintiff has not capacity to sue. Fulton Fire Ins. Co. *v.* Baldwin, 37 N. Y. 648. In this case, the plaintiff did not state that it was a corporation, and the court held that the objection was waived under the section which declares, that if no such objection be taken, either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action. In the case of The Phœnix Bank *v.* Donnell, 40 N. Y. 410, the court held that where the petition omitted to state that the plaintiff was a corporation duly organized, a demurrer to the petition for that reason was overruled by the Court of Appeals that it did not appear on the face of the petition that the plaintiff was not a corporation. This decision is based on a false assumption. The fact of corporation is an affirmative fact. No body of persons can sue in other name than their own names, unless clothed with power so to do by an act of legislation: hence, the name of the Phœnix Bank was no name, unless it was alleged to be a corporation; that averment alone can give it the right to sue, and the absence of that averment shows on the face of the petition that no such name has a right to sue, or standing in court. The rulings in Ohio, I believe, have been invariably in accordance with the view here suggested. In the District Court of Jackson county, it was some years since so ruled, and that ruling has been followed ever since; and the ruling is right, and that of New York on principle wrong, and can not be sustained. If was an effort to avoid reversing a judgment by a resort to hair splitting and bad logic. That case is doubted by M. Wait in his notes to the code.

Subdivision 3.—The pendency of one action in one State has been held to be no bar to a subsequent action for the same cause in another State. Burrows *v.* Miller, 5 Pr. 51; Brown *v.* Joy, 9 Johns. 221; Walch *v.* Durkin, 12 Johns. 99. The pendency of an attachment in one State, whereby a lien on property is acquired, has been held a bar to a second suit in another State, on the ground of a

satisfaction created by the lien acquired. A levy on goods, while undisposed of, has been held satisfaction of a judgment. Embree *v.* Hanna, 5 Johns. 101; Wheeler *v.* Raymond, 8 Cowen, 311. This is, however, an objection which can very seldom appear on the face of the petition.

Where an action for a partnership accounting was commenced by one of two partners, and the other partner subsequently commenced a second action with special averments and prayer for more extended relief without changing the nature of the action, it was held that the latter action could not be sustained. Ward *v.* Gore, 37 How. 119. The defense of another action pending, when available as established by law before the code, may be set up by demurrer, when it shall appear on the face of the petition, and by answer, when it does not so appear. Burrows *v.* Hornfager, 1 Code, N. S. 412; S. C. 6 How. 279.

Subdivision 4.—The defect of parties must be settled by the code regulating parties. A demurrer for non-joinder of parties is well taken, where it appears that the court can not determine the controversy before it without prejudice to the rights of others, nor by saving those rights. Wallace *v.* Eaton, 5 Pr. 99. If persons are made plaintiffs who ought not to have been, this is good ground for demurrer; as where husband was joined with his wife, in a case where she ought to have sued without her husband, and by her next friend. Brownson and wife *v.* Gifford et al., 8 Pr. 389. The joinder of unnecessary parties as defendants is no ground of demurrer on the part of any one but the party himself. The other defendants are not injured by his presence. Ib.; Story's Eq. Pl., secs. 509, 544. The failure to make a person a defendant, who is a necessary party to the suit, is, however, a ground of demurrer. Ib. The defendant can not be called upon to answer until all persons necessary to a complete and final determination of the case are before the court.

An improper joinder of parties plaintiff is not a subject of demurrer. Allen *v.* City of Buffalo, 38 N. Y. 280. The language of the code is, where there is a defect of parties plaintiff or defendant. It seems to be considered that *defect* means the absence of necessary parties. This is a mere dictum, not necessary to the decision of the case. It was not made by demurrer, only at the final hearing in the Court of Appeals. "*Defect* is," says Webster, in his second definition of the word, "failing, fault, mistake, imperfection in moral conduct, or in judgment." This meaning of the word is

broad enough to include a defect in making too many parties. To include too many parties as plaintiffs is surely a defect in the proceedings, as much as if there was an absence of necessary parties. How is the question to be reached, if parties are joined as plaintiffs having no interest in the case? Is a party to be permitted to join as plaintiffs whomsoever he chooses, and that imperfection in his case can not be taken advantage of on demurrer, where the defect is patent in the petition, is to my mind a strange position. The plaintiff must fail in his case, as there is no waiver of such a mistake by the code as there is about defendants.

In an action sounding in tort, where there appears on the face of the petition a non-joinder of parties plaintiff, the defendant should take advantage of the defect by demurrer. Omitting to do so, he waives the defect, although in the answer it is insisted that the petition should be dismissed for that cause. Zabriskie *v.* Smith, 13 N. Y. 322; Merritt *v.* Walsh, 32 N. Y. 685. A single creditor may commence an action in his own behalf against a judgment debtor, although it appears that there are other creditors who are not joined as plaintiffs. It is no ground of demurrer. Hammond *v.* Hudson River Iron and Machine Co., 20 Barb. 378. For a defect of parties plaintiff, all the defendants may demur. Brownson *v.* Gifford, 8 How. 389. Where husband and wife joined in an action to recover debts due the husband, a demurrer was sustained to the petition. Dunderdale *v.* Grymes, 16 How. 195; Avogadro *v.* Ball, 4 E. D. Smith, 384; Bartow *v.* Draper, 5 Duer, 130; 33 N. Y. 43

The defect of parties defendant, for which a demurrer is allowed, is, that there are too few, not too many. Richtmyer *v.* Same, 50 Barb. 55; Crosby *v.* Berger, 4 Edw. Ch. 210; Voorhis *v.* Baxter, 17 N. Y. 354; Bank of Havana *v.* Magee, 20 N. Y. 355. The joinder of too many defendants, where there is no misjoinder of subjects, is not ground of demurrer of any one of them against whom the petition sets forth a cause of action; the other parties individually and separately can demur on the ground that the petition states no cause of action or ground of relief against them. N. Y. & N. H. R. R. Co. *v.* Schuyler et al., 17 N. Y. 592; Manning *v.* State of Nicaragua, 14 How. 517.

A misjoinder of parties plaintiff, when apparent upon the face of the complaint, can not be taken advantage of except by demurrer. Fisher *v.* Hall, 41 N. Y. 416, Daniels, J., says: "As tenants in common, representing less than the aggregate common interests in the estate, the plaintiffs probably would have been unable to have maintained a joint action, if that objection had

been taken in time. Jackson *v.* Bradt, 2 Caine, 169, 174; Malcom *v.* Rogers, 5 Cowen, 188; Cole *v.* Irvine, 6 Hill, 634, 638, 639. But as the facts of the case were fully stated in the petition, showing that the plaintiffs did not represent all the common interests in the estate, if any objection was intended to be taken to their right to maintain the action on that account, it should have been presented at that time. By answering and taking issue on the case alleged, this objection was waived, and it became the duty of the court to try and determine the issue as it had been joined by the pleadings. If any objection existed to the form, in which the action was brought, it was that the petition contained several causes of action which had been improperly united. And that should have been raised by demurrer. As it was not, it was waived within the express language of section 148 of the code [sec. 89 of Ohio code]."

In the case of Palmer *v.* Davis, 28 N. Y. 242, it is somewhat discussed in the opinion of the court by Marvin, J. He says; "One of the grounds of demurrer allowed by the code (sec. 144) is, that 'there is a *defect* of parties plaintiff or defendant.'" This ground does not reach a case where there are too many plaintiffs, or too many defendants, but only those cases in which, from the statements of the cause of action, it appears that there are parties omitted, who should have been made parties plaintiff or defendant. It is the same as *non-joinder* of a necessary party, in an action at law, under the superseded system, or the omission of a necessary party in a suit in equity, where it was said the suit was *defective*, and a demurrer could be interposed for a *want of parties;* or the objection could sometimes be taken in the answer, or raised on the hearing. Now this objection of *defect* of parties must be taken by demurrer, if it shall appear upon the face of the petition. If it does not so appear, the objections may be taken by answer. Code, sec. 147. If the objection of this *defect* is not taken by demurrer or answer, the defendant shall be deemed to have waived it. Sec. 148. The language, *defect of parties*, was taken from the equity branch of the law as administered in the court of chancery, and it was happily chosen, in view of the new system. It has no reference to the *misjoinder* of parties; nor is misjoinder of parties one of the causes of demurrer under the code. As we have seen, the objection of *defect* or want of parties can not now be raised on the hearing or trial, not having been raised by demurrer or answer, and being deemed waived. But it is provided in the code (sec. 122), that "when a complete determination of

the controversy, between the parties, can not be had without the presence of other parties, the court must cause them to be brought in." If there is a misjoinder of parties, that is, if the facts stated in the complaint show no cause of action against the defendants, in favor of one of the plaintiffs, the defendants may demur, under subdivision 6 of section 144, as to such plaintiff, upon the ground that the complaint does not state facts sufficient to constitute a cause of action, and as to such plaintiff the complaint will be dismissed. And so as to one of the defendants against whom no cause of action is stated. If the objection is not raised by demurrer, or does not appear in the complaint, it may, of course, be raised on the trial, and the complaint will be dismissed as to the plaintiffs in whose favor no cause of action is shown, and so as to the defendants against whom no cause of action is shown. By section 274, "judgment may be given for or against one or more of several plaintiffs and for and against one or more of several defendants." Now, if the plaintiff has a good cause of action against one or more of the defendants, he is not to be dismissed from the court as to him or them, though he has joined one or more defendants against whom he had no cause of action. So if one is joined as a plaintiff, who has no cause of action in connection with his co-plaintiff, the complaint, as to him, will be dismissed, but his co-plaintiff may, if he has a cause of action, recover. These positions are now well understood, and have received the sanction of the courts, and I may add that I have always regarded these provisions of the code as the most valuable portions of it, effecting a very salutary reform in the law touching parties to actions."

Subdivision 5.—The improper joinder of causes of action is also a ground of demurrer. The misjoinder of causes of action in the same petition, which can be reached on demurrer, is the union of causes of action, which by section 80 can not be joined in the same complaint; but it is no ground of demurrer that separate causes of action, which may be united in the same petition, are all stated in one count, and not separately, as required by the code. In Gooding *v.* McAlister, 9 Pr. 123, Welles, J., says: "Several causes of action may be united in one complaint, and although not separately stated, still they are properly *united in the complaint;* that is to say, it is no objection that they are united in the same complaint, but the objection is that they are not separately stated. They may be properly united but improperly stated. What I mean by a misjoinder, is the union in one complaint of causes of action not al-

lowed by section 167 (sec. 80, Ohio Code). As for example, a cause of action upon a contract with one for an injury to the person." The same view is taken of the code by Marvin, J., in Robinson *v.* Judd, 9 Pr. 378, and by Selden, J., in Benedict *v.* Seymour, 6 Pr. 298; while Willard, J., in Durkee *v.* S. & W. R. R. Co., 4 Pr. 226; S. P., Pike *v.* Van Wormer, 5 Pr. 171; and Harris, J., in Getty *v.* Hudson River R. R. Co., 8 Pr. 179, held that mere duplicity is a good ground of demurrer. The former would appear to be the better opinion; misjoinder and duplicity are certainly very different. Duplicity, which is the union of two or more causes of action in one count properly joined, so far as the several causes of action are concerned, can be reached on a motion to strike out all but one as redundant, under section 118 of the code. Such is held to be the true practice in New York, as will be seen by the cases above cited.

And this is the view of the law as heretofore expounded. It is thus stated in Gould's Pl., chap. 4, secs. 98, 99. In connection with this last rule it is proper to remark that *misjoinder* of causes of action, or counts, which is a radical fault, is essentially different from *duplicity*, which is but matter of *form*.

Misjoinder of causes of action, or counts, consists in joining in different counts in one declaration several different demands which the law does not permit to be joined; to enforce several *distinct*, *substantive* rights of recovery; as where a declaration joins a count in *trespass* with another in case for distinct wrongs—or one count in *tort* with another in *contract*.

Sec. 99. *Duplicity* in a declaration consists in joining, in one and the *same count*, different grounds of action, of different natures, or of the same nature, to enforce only a *single* right of recovery.

The code speaks of *causes of action* improperly united; now this necessarily implies *causes of action* improperly united in the language of the code; and by section 80 of the code, we learn what *causes of action* may be joined, and hence what causes can be *improperly joined*. The defendant may demur to the *petition* when several causes of action are improperly joined; but several causes of action, which may be joined in the same petition, are not improperly joined, because they are all stated in one count; they are improperly *stated*, not improperly *joined*. The opinion of Jewett, J., in Cahoon *v.* Bank of Utica, 3 Selden, 486, is to the contrary, holding that duplicity is also good ground for a demurrer.

Subdivision 6.—This clause is equivalent to what was called a general demurrer at common law. Does the petition state facts which show a right of recovery against the party demurring? This question must be answered either affirmatively or negatively on the decision of every demurrer under this subdivision of the code; and it must be answered by applying the law to the facts stated, and in that way testing their sufficiency. It is sufficient, as we have seen, to state the objection in the words of this subdivision, that the petition does not state facts sufficient to constitute a cause of action. Where there are more than one cause of action set forth, the sufficiency of each count, or cause of action, must be tested by the facts contained in the count; one bad count can not be helped out by facts contained in another, unless there is such a reference in the one to the other as makes the facts referred to in the other count, a part of the count containing the reference. This may be done in the petition, as it formerly could in a declaration, and to the same extent.

Such seem to be the only grounds on which a demurrer to the petition can be founded; every other objection must be taken by motion under the provisions of section 118 of the code. By that section rebundant and irrelevant matter may be striken out on motion; while pleadings, which are too indefinite and uncertain to indicate the precise nature of the charge, may be required to be made specific, precise, definite, and certain. This motion, however, implies that facts enough are stated to show a liability; but that they are loosely and confusedly stated. If they are so uncertain that the court can give no meaning to them, then the petition is substantially defective and open to a demurrer.

A failure to demur on the ground that the petition does not state facts sufficient to constitute a cause of action, under this subdivision 6, is not a waiver of the objection, nor does it conclude one's right to insist on it in any stage of the proceeding and on error. Gould *v.* Glass, 19 Barb. 179, 186; Montgomery County Bank *v.* Albany City Bank, 7 N. Y. 459; Coffin *v.* Reynolds. 37 N. Y. 640; Higgins *v.* Freeman, 2 Duer, 650; Budd *v.* Bingham, 18 Barb. 494. So, where two or more defendants are joined, and the petition does not show a cause of action against some of them, such defendants may avail themselves of the objection on the trial. Montgomery Co. Bank *v.* Albany City Bank, 7 N. Y. 459. In this last case Jewett, J., says: "Section 144 of the code provides for a demurrer to a complaint in six distinct cases, and section 148 provides that, if the objection is not taken by either demurrer or answer, the de-

fendant shall be deemed to have waived all except the *first*, which is that the court has not jurisdiction of the person of the defendant, or the subject matter of the action, and the sixth, which is that the complaint does not state facts sufficient to constitute a cause of action. The defendants' counsel took the objection on the trial, substantially that the defendants were not charged by the complaint or evidence with a joint liability to the plaintiff for the neglect, which occasioned the loss suffered. The objection came in time. There was no cause of action shown by the plaintiff against the Bank of the State of New York, and, therefore, the complaint as against it should have been dismissed. The result is the judgment as against the Albany City Bank must be affirmed with costs, and reversed as to the Bank of the State of New York, and the complaint as to that bank dismissed, with costs against plaintiff."

A demurrer under this subdivision only reaches the *case* made in the petition, or defense in the answer; the only question raised by such a demurrer is, does the complaint, on its face, entitle the plaintiff to the relief by him claimed? Nor is it material whether the relief demanded be equitable or legal. Under this assignment of demurrer, the pleader can not take advantage of the objection that the party has not a legal capacity to sue, or that there is a defect of parties, or a misjoinder of causes of action.

The demurrer puts in issue on this ground the whole petition, and if any facts necessary for the plaintiff to prove, in order to sustain his action, are not stated, a demurrer will be sustained. This goes to the law of the case made in the petition. To sustain the demurrer under this head, the statement of the facts must be such that, admitting them to be true, the court is in law authorized to say that they furnish no cause of action against the defendant demurring. One defendant may demur, if the petition shows no right of action against him, though there may be against the others. 37 N. Y. 640; 40 N. Y. 410.

Where the petition shows on its face a cause of action barred by the statute of limitation, it is not error to sustain a demurrer to it. Comm'rs *v.* Andrews, 18 Ohio St. 49; Sturgis *v.* Burton, 8 Ohio St. 215. The reason for this rule in Ohio is founded upon the decision of the case of Hill *v.* Henry, 17 Ohio, 9, in which it was decided that no action could be sustained on a claim once barred; if there was a promise to pay the claim after the bar, it was a new contract not in writing, and the action must be founded on that and not on the original claim. The bar of the statute extinguishes the right of action. The same ruling has been made by the Supreme Court of

Kansas, in the case of Zane *v.* Zane, 5 Kansas, 134. The same doctrine is stated in 2 Van Santvoord's Pl. (2 ed.) 268, 269. On this point of demurring, *vide* People *v.* Mayor N. Y., 8 Abb. 7; S. C., 28 Barb. 240; 17 How. 56; Sinclair *v.* Fitch, 3 E. D. Smith, 677; Richards *v.* Edick, 17 Barb. 260; Graham *v.* Camman, 13 How. 360; S. C., 5 Duer. 667; Richards *v.* Beavis, 28 Eng. L. & Eq. 157; Goodall *v.* McAdams, 14 How. 385; Goelet *v.* Gori, 31 Barb. 314.

Sec. 88. The demurrer must specify the grounds of objection to the petition. Unless it do so, it shall be regarded as objecting only that the petition does not state facts sufficient to constitute a cause of action. If the demurrer do not state the specific objection, it will be held to relate only to the 1st and 6th subdivisions, to the jurisdiction of the court, and the insufficiency of the case set forth in the petition. It is true this section confines it to the 6th subdivision, but objection to jurisdiction can be taken at any time. Fulton Fire Ins. Co. *v.* Baldwin, 37 N. Y. 648. In a demurrer under the 1st and 6th subdivisions of section 87, it is sufficient to state the grounds of it in the language of the subdivisions; but a demurrer under either of the other subdivisions must specifically point out the ground of the objection. Swift *v.* Dewitt, 1 Code, 25; S. C. 3 How. 280, under name of Dewit *v.* Swift; Glenney *v.* Hutchins, 2 Code, 56; S. C., 4 How. 98; Haire *v.* Baker, 5 N. Y. 357.

A demurrer stating "that it does not appear that the plaintiff had any title to the note when the suit was commenced," is insufficient to raise the question as to plaintiff's right to sue. White *v.* Low, 7 Barb. 204. So one merely stating that there is a defect of parties defendant, is defective. Skinner *v.* Stuart, 13 Abb. 443; S. C., 15 Ib. 391; 39 Barb. 206. Where the ground of demurrer stated was that the petition did not state facts sufficient to constitute a cause of action, and, among other things, that it did not show plaintiff's capacity to sue, it was held that, though the latter objection should have been stated as a distinct ground, yet it was sufficient to raise the question as to the plaintiff's capacity to sue. Conn. Bank *v.* Smith, 9 Abb. 168; S. C., 17 How. 487.

Sec. 90. Where a demurrer is sustained for misjoinder of causes of action on motion of the plaintiff, the court shall allow him, with or without costs, to file several petitions, each including such causes of action as are allowed to be joined; and each petition shall be docketed as a separate action. Such an amendment should never be made without making plaintiff pay the costs of the service under our practice, where no costs are allowed on a demurrer.

CHAPTER XIII.

ANSWER.

THE following are the provisions of the code on this subject:

SEC. 92. The answer shall contain:

1. A general or specific denial of each material allegation of the petition controverted by the defendant.

2. A statement of any new matter constituting a defense, counterclaim, or set-off, in ordinary and concise language, and without repetition.

SEC. 93. The defendant may set forth, in his answer, as many grounds of defense, counterclaim, and set-off, as he may have, whether they be such as have been heretofore denominated legal or equitable, or both. Each must be separately stated and numbered, as they must refer in an intelligible manner to the causes of action which they are intended to answer.

SEC. 94. The counterclaim, mentioned in the last section, must be one existing in favor of a defendant, and against a plaintiff, between whom a several judgment might be had in the action, and arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim or connected with the subject of the action.

SEC. 95. If the defendant omit to set up the counterclaim or set-off, he can not recover costs against the plaintiff in any subsequent action thereon; but this section shall not apply to causes of action which are stricken out of or withdrawn from the answer, as provided in sections 96 and 119.

SEC. 96. When it appears that a new party is necessary to a final decision upon the counterclaim, the court may either permit the new party, to be made by a summons, to reply to the counterclaim, or may direct the counterclaim to be stricken out of the answer, and made the subject of a separate action.

SEC. 97. A set-off can only be pleaded in actions founded on contract; and must be a cause of action arising upon contract or ascertained by the decision of the court.

SEC. 98. When it appears that a new party is necessary to a

final decision upon the set-off, the court shall permit the new party to be made, if it also appear that, owing to the insolvency or non-residence of the plaintiff, or other cause, the defendant will be in danger of losing his claim, unless permitted to use it as a set-off.

Sec. 99. When cross demands have existed between persons under such circumstances, that if one had brought an action against the other, a counterclaim or set-off could have been set up, neither can be deprived of the benefit thereof by the assignment or death of the other, but the two demands must be deemed compensated, so far as they could equal each other.

Sec. 100. The guardian of an infant or person of an unsound mind, or attorney for a person in prison, shall deny, in the answer, all the material allegations of the petition prejudicial to such defendant.

The codes of Ohio, Kansas, and Nebraska are substantially alike in regard to an answer. The New York code, after saying that it must deny each material allegation, says "or of any knowledge or information thereof sufficient to form a belief." This was the rule in chancery and can have no application in a common-law pleading, which is to state nothing but facts. Where discovery was sought in chancery, this language was appropriate. The forms got up under the New York code are, therefore, not applicable to the codes of the States above enumerated. It is unnecessary to state how the facts set up in the answer came to the knowledge of the defendant, whether he knows them personally, or only from the information of others. In his affidavit to the answer, he swears he believes the answer to be true. Where the answer is sworn to, such an averment as the New York code requires is unnecessary, and where it is not sworn to, it is absurd.

The code by a single definition undertakes to include answers to actions both at common law and in equity. The two are so unlike in nature and remedy that they can not both be included in the same definition. A defense, which every answer is required to present, is entirely applicable to actions at common law; but in equity, an answer may be no defense in the proper meaning of that word, as an answer setting up a lien on a fund, or modifying the relief sought in the petition, or setting up what is a defense only to a part of the claim of the plaintiff. An answer in an equitable case must be molded to meet the case made, or any modification of it, or some excuse for not granting the relief, or setting up liens to lands or funds, either superior to the claim of the plaintiff or sub-

ordinate thereto. While a plea or answer to an action at law is required to meet the plaintiff's case by a denial, or by new matter, which shall defeat a recovery, it must only present but a single fact, on which issue may be taken; while in a case in equity the answer must set up all the facts calculated to defeat the claim of the plaintiff or secure the rights of the defendant. The result of this effort at uniformity has been to force the courts to construe the code as to an answer as they have done, as to the petition, so as to include the two species of relief and a pleading adapted to the nature of each remedy.

The word defense is held not to be used in its primal legal sense, to wit, resistance or denial; but is used to signify such new matter as constitutes either a complete or partial bar to the action. Thus the word "defense" has ceased to mean only justification, and as now used, it applies to matters which go to a partial as well as a total extinguishment of plaintiff's claim. Bush *v.* Prosser, 11 N. Y. 347. But this construction does not reach the case of conflicting liens, where the answer is no denial or new matter constituting a defense; it merely states the facts on which the lien rests, and leaves to the court the law as to their respective priorities. There are numerous other cases of the like character. The code, therefore, must be construed to mean, whether its words import that or not, that the answer may be of any character or form necessary to the presentation of the claims and rights of the defendant, as those rights are fixed by law, whether that law is common or equity law. The code was intended to furnish the means of enforcing all rights and making all defenses, which either the common law or law as administered in a court of equity insured to him. This is the only construction, which will make it subserve the ends of justice.

And such is the construction given to it, in fact, by our Supreme Court in the case of Peebles *v.* Isaminger et al., 18 Ohio St. 490. This was a contest growing out of partnerships in running a furnace, where there was a contest between different classes of creditors and as to their respective priorities. The bill set forth a mortgage by Isaminger to plaintiff's testator of 3-32 parts of certain real estate, and asked a sale thereof. The defendants set up that the land, a portion of which was mortgaged, was partnership property; that the firm became insolvent, and after some changes became a corporation by the name of Buckeye Furnace Company, which succeeded to all the rights of the prior insolvent company, and was liable for its debts. Daniels *v.* Rathburn set up a prior and junior mortgage given by the company on all the lands of the

company, and insisted that the assets be applied to partnership debts prior to the debt of Isaminger due the plaintiffs. Demurrers were plead to these answers. It will be seen that here was no defense to plaintiff's suits; on the facts set up in the answer, plaintiffs had a right to file this petition to reach at any rate any interest Isaminger might individually have in this real estate. These answers neither denied the case made by the plaintiffs in their petition, nor did they set up new matter by way of defense to the action; the answers simply set forth the character of Isaminger's interest in it as a partner, and that there were partnership debts and mortgages to be paid before any part of the firm assets could be applied on the individual mortgage of Isaminger. These answers were absolutely necessary to the settlement of the rights of the parties, and yet neither of them constituted a denial of the facts stated in the petition, nor did they state new matter constituting a defense of the action. It was a case clearly outside of the letter of the code, and as such the court had to deal with it.

Welch, J.: "Whether the demurrer to the answer is well taken, seems to be the only question legitimately before us, and we decide this without hesitation in the negative. It is not necessary that an answer to a petition *seeking equitable relief* should set up *a complete defense to the action.* It is enough that it deny, or confess and avoid, some *material part* of the plaintiff's case, so as to modify or abridge his right to relief; or, if counter-relief is asked, that it shows a right in the defendant to such counter-relief. Where, as in the present, such an answer does not profess to be, and is not from its nature necessarily pleaded *as a bar to the action*, a demurrer to it raises no question of its sufficiency as such. The answer in such a case is more like the old answer in chancery than it is like the common-law plea in bar, or the plea to a bill in equity. A demurrer to an answer was never allowed in chancery practice, if indeed it was ever heard of. The remedy, in case of insufficient answer, was by motion to strike it from the files, or to take the bill as confessed, notwithstanding the answer. The only question, upon such a motion was, whether the answer was *pertinent* and *material* to the case. An answer in such cases is always pertinent and material, when, in the language of the court in Van Rensselaer *v.* Price, 4 Paige Ch. 174, it can have any influence whatever in the decision of the suit, either as to the subject-matter of the controversy, the particular relief to be given, or to the costs. See also Lube's Eq. Pl. 178; Mitf. Eq. Pl. 249; Van Santvoord's Pl. (2 ed.) 472, 705. Tried by these rules, it is hardly necessary to

say, the answers in question are sufficient, and the cause must be heard upon the facts they disclose as well as upon the petition, unless those facts are controverted by the reply."

This decision is all right; the facts contained in the answers were absolutely necessary to be stated on the record so that the rights of the parties might be legally passed upon. But where in the letter of the code is there any authority for such an answer? Nor does the court allude in its decision to the code, but predicates its decision upon the law of pleading as heretofore recognized in courts of equity. It is true there is one section in the code, which justifies this mode of reasoning and the conclusion arrived at, to wit, section 603, which provides that, "if a case ever arise, in which an action for the enforcement and protection of a right, or the redress or prevention of a wrong, can not be had under this code, the practice heretofore in use may be adopted so far as may be necessary to prevent a failure of justice." This section permits the court to resort to the prior rules of pleading and practice, where the code does not provide a remedy for an existing right. The court say it is not necessary that an answer to *a petition seeking equitable relief* should set up a complete defense to the action. The court here confine their remark to an action founded on principles of equity, thus making a distinction between actions at law and suits in equity as to the character of an answer, and yet the code makes no such distinction; but the *nature of things* makes it, and no act of legislation can destroy it. The court, therefore, was compelled to hold that the code must be construed with reference to the nature of the case, and must mean one thing when applied to an action at law, and another when applied to a suit in equity. Such was the object of the code to provide for answers in equity as well as in cases at law, and must receive such a construction as will secure that end. Hence, on this authority, the validity of an answer to a suit in equity is to be settled by an appeal to works on pleading in equity and the decisions of courts of chancery. This must be done, if the law as recognized in courts of equity is to be carried out, and rights under it enforced and protected. The decision would have been more satisfactory, if it had been placed directly on this forced construction of the code, as indispensable to attain the end intended by it—the administration of justice according to the rights of parties, whether arising under the common law or under the law as administered in a court of chancery. And the code gives the rule of construction: it is "to be liberally construed with a view to promote its objects and assist the parties in

obtaining justice." Such a liberal construction being indispensable to assist parties in obtaining justice, it is the duty of the court to recognize such construction, and say that whatever was a good *plea* to an action at law, is now a good *answer* to an action founded on legal principles, and whatever was a good answer in a suit in equity under the old practice, is a good answer under the code. This recognizes the absolute distinction which exists between the two classes of cases, and renders the pathway of the pleader easy and certain. He will know when he is right and can know when he is wrong, because equity pleading under the old practice was simple and easily understood; and this case is a direct authority for this view of the code and what must be the practice under it.

It is the duty of a guardian to make for the infant a proper defense, and for this purpose to bring the rights of his ward under the consideration of the court for adjudication. Long *v.* Mulford, 17 Ohio St. 484. The court say: "The appointment of a guardian *ad litem* is not a mere matter of form. A suit against an infant can not be prosecuted without such guardian; and the object of the requirement is to secure to the infant a proper defense. It is the duty of a guardian *ad litem* to ascertain from the infant and his friends, or from other sources of information, what are the legal and equitable rights of his ward. And it is the special duty of the guardian to bring those rights directly under the consideration of the court for decision. Dow *v.* Jewell, 1 Foster, (N. H.) 486; Seance *v.* Whitney, 12 Ill. 150; Knickerbocker *v.* De Frust, 2 Paige, 304; 1 Daniel Ch. Pr., title Infants. His authority is to protect; and the court will not suffer his ward to be prejudiced either by his admissions or his laches. Bing. on Inf. 135. And where the answer of the guardian admits the bill to be true, the complainant must prove its allegations with the same strictness, as if the answer had interposed a direct and positive denial. Enos *v.* Copps, 12 Ill. 257; 8 Ohio, 377; 4 Gill, 370."

It will thus be seen that a guardian for the action has not done his duty in putting in the answer provided for in the code; an answer denying all the facts set up in the petition. It is his duty to investigate the case of his infant client, and see if there are other defenses than a simple denial. And yet the practice is of the very loosest character. The plaintiff moves for the appointment of the guardian, names the person, and generally draws up the formal answer of a general denial, and goes on to trial without any investigation of the case by the guardian for the action; and the guardian seems to suppose he had discharged his duty by putting in a formal

answer of denial. By this loose practice, the rights of infants are being every day sacrificed in courts of justice by parties having interests opposite to theirs. There are often other defenses which can not be set up without a special answer, and will not be made manifest to the court trying a case on a general denial. It is important that courts should require the guardian to look into the case, and not allow an interested plaintiff to have the whole thing in his own way. The above case of Long *v.* Mulford is a good illustration of that kind of practice, and I have in my own mind a case decided by myself, where the grossest injustice was done, because the real case was not set up in the answer. The court rely too much upon counsel, while the counsel is inspired in his action by the representations of his client, who is interested against the minor defendants.

It is not necessary that an answer should meet the whole case made in the petition; an answer is sufficient if it constitute a defense or counter-claim, or set-off to so much of the petition as it professes to answer. McKyring *v.* Bull, 16 N. Y. 297, 307; Allen *v.* Haskins, 5 Duer, 322; Kneedler *v.* Sternberg, 10 How. 68. But if it assumes to answer the whole cause of action, and in fact only answers a part of it, it may be demurred to. Foster *v.* Hazen, 12 Barb. 547; Beach *v.* Barons, 13 Barb. 306; Thumb *v.* Walrath, 6 How. 196; Nichols *v.* Dusenbury, 2 N. Y. 283; Hawk *v.* Pollard, 6 Blackf. 108, 351; Cross *v.* Watson, 6 Blackf. 129. The answer should distinctly specify that portion of the petition to which it applies. 1 Barb. 480; 13 Barb. 547.

The subject of answers divides itself naturally into two great classes:

1. *A denial of what is contained in the petition.*
2. *The statement of new matter constituting a defense, etc.*

This is the old distinction at common law, and it is one founded in the very nature of a legal proceeding by action whether at law or in chancery.

THE DENIAL.

A denial may be either *general* or *special;* a general or specific *denial* of each material allegation of the petition, controverted by the defendant. The answer is to be a *denial*, not an *admission*, of the facts set up in the petition. It would seem, therefore, that an answer admitting the facts of the petition ought to be stricken out

as frivolous because it is unnecessary. Every allegation not denied, is admitted; it is, therefore, only incumbering the record to put on file an answer admitting just what the law would have taken for granted and as true, for the purposes of the trial. Where, therefore, a party can not deny, he must remain silent and let judgment go by default. In actions pending on damages that are uncertain, the defendant contests the amount on an inquiry of damages. Thus, in an action of slander, if he can not deny the speaking of the words, he can put in no answer; he must go to a jury on an inquiry of damages, and in that way contest the amount of the recovery. The same is true of every action where the amount to be recovered is uncertain, to be estimated by a jury, or a court upon evidence. Van Santvoord's Pl. 249; Lewis *v.* Coulter, 10 Ohio St. 451; 18 N. Y. 121.

I. *Of a General Denial.*

A general denial is one which meets all the material allegations of the petition with a negative and compels the plaintiff to prove them in order to recover. It is equivalent to the general issue of *nil debet*, in debt; *non assumpsit*, in that action; and not guilty, in an action of trespass, as these issues have been limited by the new rules in England. They deny all the material allegations of the petition, put them in issue, and nothing more. The simple inquiry is, has the plaintiff proved what he has alleged in his petition? Under such an issue nothing can be given in evidence which does not tend to prove or disprove the facts stated in the petition; every other defense must be specially pleaded as new matter. Under the issue of not indebted, nothing is in issue but the truth of the plaintiff's claim; payment, set-off, and every other new matter must be specially set up under the second division of the subjects of answer.

The old general issues are as well calculated as any that can be substituted to meet the wants or demands of a general denial. In actions founded on torts, no good reason can be seen why the plea of general denial should not be substantially a plea of not guilty. That plea puts in issue all the material facts in the declaration. Although in its terms it is said, "the defendant is not guilty of the said supposed grievances above laid to his charge, or any or either of them, or any part thereof, in manner and form as the plaintiff hath above thereof complained against him," it was construed not merely to deny the actual *form and manner* of the charge, but to

controvert the *substance* of every cause of action contained in the declaration. Per Barculo, J., Salinger *v.* Lusk, 7 Pr. 430.

"The wit of man," says the same judge in that case, "has never yet devised, and it may well be doubted whether the present generation, with all its labors, will ever bring forth, any *formula* equal to the old general issue for the purposes of a general denial. It united the great elements of all good pleading—brevity, simplicity, and comprehensiveness. And if the principle of a general denial is to be reinstated, of which we have all the encouragement derivable from the fact that it has stood firmly as the law of the land since the 6th day of May last, notwithstanding its previous unsteadiness, I see no reason why the courts should not sanction the old form of pleading—the general issue—and thus put an end to this vexatious and useless course of litigation."

Nor can we see any reason why this general denial should not assume some fixed form; and what form better than the old? It is all important to have some common form; otherwise the court must settle the meaning and extent of the denial in each case; whereas an agreed *form* becomes settled, its meaning is *fixed;* so that in making use of it one knows exactly what is in issue, and what is to be proved on one side and to be disproved on the other. The parties know what evidence such an issue calls for, and what evidence is admissible under it. Nor will parties be taken by surprise by the court's taking a different view of the issue and of its extent from what counsel have.

Where, therefore, the plaintiff claims that the defendant is indebted to him in a certain sum for goods sold, labor performed, money had and received, money paid, or on an account stated, the defendant should be permitted to aver that he is not indebted to the said plaintiff in the said sum, nor any part thereof, as the said plaintiff hath in his said petition alleged. This covers the whole of the plaintiff's claim, and puts in issue the truth of it and every part thereof. If the defendant admits the correctness of what the plaintiff claims, he must set up as new matter any facts which defeat this apparent right of recovery. So where the plaintiff declares on a promissory note, why should not the defendant be permitted to make his general denial, by averring that he did not promise in manner and form as the said plaintiff hath thereof declared against him in his said petition? If the plaintiff complains of a tort in its various forms, whether with or without force, what better general denial than that of "not guilty?" Unless some such method is adopted for a general denial, infinite conflicts and

difficulties must arise in endeavoring to ascertain whether a denial is general or special; and if general, does it deny what is immaterial as well as what is material?

To an allegation that the defendant "assaulted the plaintiff, and seized him by the collar and shook him violently," the defendant "denied that he did assault the said plaintiff, and seize him by his collar and shake him violently." The court held the answer bad. "The defendant," said Barculo, J., "has grouped three of the charges, and denied them on oath in such a manner that, if he should be guilty of two, and not guilty of the other one, his answer would not be literally untrue." Hopkins *v.* Everett, 3 Code, 150. In this case the assault was the gist of the dispute; the other facts were mere facts of aggravation. In Kellog *v.* Church, 4 Pr. 339, it was held a sufficient general denial of an allegation of the taking of sundry articles of personal property, to say that the defendant "*denies each and every allegation alleged in said complaint.*" Cady, J.: "I think such an answer will do. It would be intolerable to require specific denials of an entire complaint in other terms. I will not aid in establishing the intricate and voluminous system of pleading under the code, which seems to be growing up in practice; I can not believe that it was the design of the code-makers; and until my position is overruled by the Supreme Court in bench, I shall hold such a denial as this good." So in Dennison *v.* Dennison, 9 Pr. 246, an answer which denied each and every allegation of the complaint, seems to have been considered sufficient as a general denial.

These cases show what is meant by the term *general denial;* it is a denial which meets all the averments of the petition, without going over them in detail, and in that way making the answer but a copy of the petition with a negation added to it. This serves only to increase the length of the record without advantage to any one.

There has been an objection raised to the denial that the defendant is not indebted in manner and form as the plaintiff has declared against him, as not a good denial, because it refers, not to the time when the cause of action arose, but when the suit was commenced, and hence payment or any other defense would come in under that issue. That was the old construction of the plea, and it may be on that account objectionable. Under the new rules of pleading in England the plea has been changed; and it now is stated in this form: *that the defendant never was indebted to the plaintiff in manner and form as he has in his said petition averred.* This form meets the

true issue, the fact whether such indebtedness ever did exist. This is equivalent to saying that he denies each and every allegation contained in the petition. Timmis *v.* Gibbins, 14 Eng. L. & Eq. 64. The form of the answer should be, I think, "that the defendant never was indebted;" hence any defense arising after the existence of the indebtedness would have to be specially plead, like payment, release, etc.

In practice these general denials are infinite in variety; each attorney forms one for himself. The general form is that he denies each and every allegation contained in said petition, or all and several the allegations. The object is to make a form short and comprehensive. In such a case, a single count in the answer is all that is required, no matter how many separate causes of action may be stated in the petition. A general denial may be interposed to each cause of action; but in case there is more than one denial, each separate denial must be separately stated and numbered; they must not all be run together into one paragraph or count. In Van Giesen *v.* Van Giesen, 10 N. Y. 316, 318, Johnson, J., says: "Section 128 contemplates but two sorts of allegations by way of defense: the first, denials of allegations of the complaint. Every such denial of a material allegation forms a separate defense, and should, under section 129, be separately stated."

In the case of Wall *v.* Buffalo Water-works Co., 18 N. Y. 119, it was held that where, in an action for damages caused by negligence in leaving a ditch open, the complaint stated that plaintiff fell into it, "without any fault or want of care on his part," the answer denied that the plaintiff, without any fault or want of care on his part, did fall therein, this put in issue the falling into the ditch, as well as the exercise of proper care by the plaintiff. Such an ambiguity in an answer is the proper subject for a motion that it be made more definite and certain; and that if the plaintiff goes to trial without availing himself of that remedy, the answer is to be construed most strongly against him. Roosevelt, J., says: "We consider the answer notwithstanding as open to criticism. It is a species of negative payment. But the plaintiff, if dissatisfied with the vagueness and uncertainty of the pleading, had his remedy by motion. Not having applied at the proper time for an order to compel the defendant to be more definite and certain, he is presumed to have been satisfied with the pleading as it stood, especially as he knew that under the present system it was made the duty of the court to construe pleadings liberally, and, of course, not to assume that parties by implication intended to admit, when they

could safely deny their adversary's case." So where, to a petition averring a forfeiture of the lease by underletting without consent of the lessor, the defendant in his answer denied that, in violation of said covenant and without the consent of said plaintiff, he had underlet said premises, the court below held that this admitted the underletting by not denying it; but the Court of Appeals held that the answer did deny the fact of underletting, as well as doing it without the consent of the landlord. Lawrence *v.* Williams, 1855, stated by Roosevelt, J., in his opinion in the above case, 18 N. Y. 122. So where an answer "denied all the *material* allegations of said plaintiff in his said petition," the court held that the answer was uncertain, but would have been good on demurrer; but that, had a motion been made for that purpose, the defendant might have been compelled to make it more certain and specific. The pleader ought not to be permitted by the use of the qualifying word *material* to assume to himself the determination of the question as to what facts are material, and thus render a conviction for perjury difficult or impossible. And where the denial is general, it should be of *each and all*, or *each and every* of the allegations referred to. Lewis *v.* Coulter, 10 Ohio St. 451.

Where the petition averred that the defendant committed a wrongful act while he was in the employment of another, without alleging that the act was done within the scope of his employment, is not demurrable, and an answer denying that the defendant committed such act, and alleging that it was committed by a third person, is merely a denial and requires no reply. Hoffman *v.* Gordon & Bro., 15 Ohio St. 211. The reason for this last ruling is apparent; if the defendant did not do the act, in that action it was immaterial who did it. The last clause was wholly irrelevant and immaterial; the denial that he did it, meets the whole case of the plaintiff. So I think that an answer would be good which should deny each and all the allegations contained in the petition, except the allegation of the making the written contract attached and made a part of said answer. This is a briefer form, where the denial meets all the averments except one. Denials are too often prolix, denying all and each at first and making numerous special denials, so that a jury is confounded in discovering the true issue on which they have to pass. Where there is a general denial there should be no other, and the special denials may be struck out on motion as superfluous and immaterial; and where special issues or denials are made, there should be no general one. Special denials are only appropriate when there are portions of the petition which

the defendant can not deny, and other portions which he can safely deny; in such a case the denials should be special to each material averment, and as above said, should each be stated separately and numbered, as each denial is a complete defense to the action.

It seems that an answer which contains a general denial of each and every allegation of the petition, except certain parts therein admitted or excepted from the operation of the denial, is good. Parshall *v.* Tillon, 13 How. 7; Genesee Mut. Ins. Co. *v.* Maynihen, 5 Ib. 321; Smith *v.* Wells, 20 Ib. 158. The word *controverted*, in connection with the word *denial*, whether the denial be general or special, requires that the answer should so describe the allegation of the petition controverted that any person of intelligence can identify them. Mattison *v.* Smith, 19 Abb. 288; S. C., 1 Rob. 706. An answer which denies all the allegations which are contained between specific folios, is good as a general denial. Ib.; Gassett *v.* Crocker, 9 Abb. 39. Yet *quære*? How, when pleadings are copied or recorded, shall one know what is or is not denied? The resort must in all cases be to the original paper to which the answer was filed. An answer may contain a general denial of part of a petition, and a special one of the remainder. Blake *v.* Eldred, 18 How. 240. This ruling is somewhat inconsistent with the definition of a general denial being a denial of all the allegations of the petition.

An answer which, instead of denying the allegations of the petition, contains a version of the transaction, which is partially inconsistent with such allegations, and merely implies that such allegations are controverted, or justifies an inference that such is its effect, is not a denial. West *v.* Amer. Exch. Bank, 44 Barb. 176; Wood *v.* Whiting, 21 Ib. 190; Hamilton *v.* Hough, 13 How. 14; Isles *v.* Tucker, 5 Duer, 393. Where an answer alleged that the contract was incorrectly stated, and also contained a specific denial of several parts of the contract without any further denial, it was held that the agreement, except those parts specifically denied, was admitted. Levy *v.* Bend, 1 E. D. Smith, 169.

A denial must be direct, not argumentative; not in the alternative nor in the disjunctive. The anwer must allege specifically a denial of a particular averment, and each denial should be distinct and separate. So where an answer grouped three of the plaintiff's allegations together, and denied neither the first, nor the second, nor third were true, it was held bad. Hopkins *v.* Everett, 3 Code, 150; S. C., 6 How. 159.

Where the petition alleges several causes of action, or a divisible cause of action, the defendant may deny part, or some, or one of

the causes of action and leave the remainder unanswered. Tracey *v.* Humphrey, 5 How. 155; Willis *v.* Taggard, 6 How. 433; Snyder *v.* White, 6 How. 321. Or answer it by any other defense or defenses. Longworthy *v.* Knapp, 4 Abb. 115.

II. *Of a Specific Denial.*

A specific denial is where the defendant takes issue on some material averment of the petition. It may be illustrated in the pleadings in covenant under the former system. The defendant could deny the execution of the covenant, or the breach of a condition, or any other material averment contained in the declaration. The effect of such a denial was to have every other matter admitted, and to confine the evidence to that particular issue. So under the code, the defendant may confine his denial to a single fact; as in an action to recover specific personal property, the defendant may deny the *property* of the plaintiff in the article demanded, or he may deny that he did detain the possession of said property from the plaintiff. So in an action against indorsers. on a note or bill, the defendant may deny specifically the making of the note or bill, the indorsement of it, the demand and non-payment, or the notice thereof. Either one of these facts is material to be proved, and a failure to prove either will defeat the right to recover. In an action to recover real estate, where the plaintiff claims title thereto, the defendant may specially deny this allegation, thereby admitting all other material averments, as his own possession, or he may deny the withholding of the possession from the plaintiff, thereby admitting his title. Corwin *v.* Corwin, 9 Barb. S. C. 219; Van Santvoord's Pl. 249.

The defense must be either *general* or *special;* it can not be both. The general denial puts in issue every allegation of the petition, as fully as the special denial could. The specific denials are, therefore, in such a case unnecessary and redundant. Dennison *v.* Dennison, 9 Pr. 246. So the denial must not be in alternative form; the denial must be general or specific. 8 Pr. 193.

Where the denial is specific, and takes issue on an immaterial matter, the plaintiff may either ask for a judgment, notwithstanding the answer, or move to strike out the answer, as frivolous and redundant. Generally, where the answer is insufficient—that is, where, admitting it to be true, the plaintiff is still entitled to recover—he may apply for judgment on the ground of the insufficiency of the answer; but the answer must, of course, be palpably

so; otherwise, the objection should be made in some other form. 6 Pr. 355; Van Santvoord's Pl. 251.

It is a very important question to be settled, how far these general denials extend. By the old rules of pleading, defenses could not, in many cases, be set up unless specially pleaded; such as coverture. But it would now seem that, under the code, the defendant has a right to deny every material allegation of the petition; and hence that he has a right to disprove the truth of that allegation. For instance, where the suit is on a note, the defendant denies the making of the note, can not the defendant prove any fact which goes to show that such note was a *void* note in its inception? Does not the issue raise that very question? If the note was *void*, it never had any validity; and in legal contemplation the defendant never did promise to pay the amount thereof. So, take the case of trespass to lands. The plaintiff avers that the defendant broke and entered *his* close; the defendant denies generally. This puts in issue the *possession* of the plaintiff, and the defendant may disprove that possession; but if he wishes to show *title* out of the plaintiff, he must plead it specially.

Within the principle laid down, that whatever goes directly to controvert or disprove a material allegation in the plaintiff's complaint may be given in evidence under a general or specific denial of such allegation, it is presumed that any fact, going to show the contract actually *void*, may be given in evidence under such denial. Thus, for example, a contract for the sale of lands, unless in writing, is *void*, by the statute of frauds. In an action on such a contract, the defendant may deny generally the plaintiff's case as made in the petition, or he may specifically deny that he entered into or made such a contract; and on this issue the plaintiff must be held to prove a *legal* contract, a binding contract, and hence a contract in writing. So if a contract is obtained by duress, can not this fact be investigated under a general or special denial of the making of such a contract? This evidence shows that in law there never was such a contract; a contract which in law bound the defendant.

But where the contract is only *voidable*, like those of *infants*, lunatics, etc., the objection must be made by the answer, or it will not be open to evidence on the trial.

Fraud in the execution of an agreement, whether by parol, or under seal, renders it void; as where one agreement is fraudulently substituted for another, or fraudulently misread. So, also,

are all contracts made to compound a criminal prosecution, or where the consideration is illegal; the facts constituting the fraud, or the illegality of the consideration, or other matters going to show the contract or cause of action *void in its inception*, may, in all cases, be properly alleged in the answer; but it is submitted that it is also competent for the defendant to show the facts, on a general specific denial, that such a contract was ever made. This, of course, would not apply in cases of negotiable paper, when indorsed; because the indorsee has *prima facie* a right to recover against the maker, unless he can prove notice to the indorsee of the facts rendering the instrument void. Hence notice is an additional element not involved in the issue on the execution of the contract.

Such, too, is the view of the law taken by Mr. Van Santvoord in his work on pleading. Van Santvoord's Pl. 252, et seq. *Vide* also McMurry *v.* Gifford, 5 Pr. 14. The true rule, then, would seem to be that under the general or special denial any matter may be given in evidence, which shows that the plaintiff never had any right to recover or maintain an action against the defendant. This rule, of course, applies to those special denials which deny the very gravamen of the plaintiff's cause of action; a general denial, of course, does this.

What may be specially denied.—An answer saying that he "denies that the said plaintiff is entitled to the sum of money demanded in this action, or any part thereof," is bad. Drake *v.* Cockcroft, 1 Abb. 203; S. C., 10 How. 377; 4 E. D. Smith, 34, 39. An answer averring that the plaintiffs are not joint owners of the property is material and new matter requiring a reply. Walrod *v.* Bennett, 6 Barb. 144. In an action for the conversion of personal property, the value of the property is not traversable matter, and must be proved, whether denied or not. Connose *v.* Farrell, 2 E. D. Smith, 314; McKensie *v.* Farrell, 4 Bosw. 173; Hackett *v.* Richards, 3 E. D. Smith, 13; S. C., 13 N. Y. 138; Woodruff *v.* Cook, 25 Barb. 505. The defendant may always prove the true value of the property on the trial. Ib. And where the petition on a note gives credit for part payment, that is not an issuable fact. Hodgins *v.* Hancock, 14 Mee. & Wels. 120, Alderson, B. When it is said that you may traverse any substantial allegation, that must be understood to be some allegation material to the maintenance of the action. But can it be said to be material, when a man goes for the residue of a demand, to deny that he was paid the former part? The declaration would be good, although the allegation of part

payment were struck out. Under our decisions, that a claim is extinguished by the bar of the statute, such an averment made in the petition to avoid the statute would be material; because, if struck out, a demurrer would lie, as the claim would appear to be barred. But where the question is simply one as to how much has been paid, then no issue can be taken on the admitted payment. If more is claimed to be paid, the answer must set up the payment as claimed by the defendant.

In an action for goods sold and services rendered, an answer, which denied the value of the services, was held to raise a material issue. Gregory *v.* Wright, 11 Abb. 417. An allegation of value, however, need not be denied; indeed, should not be denied. McKensie *v.* Farrell, 4 Bosw. 193. Nor is the allegation of damages a traversable fact, nor does a failure to deny admit the amount; and on default, the plaintiff must prove his damages. Gilbert *v.* Rounds, 14 How. 46. An allegation in answer that the defendant never gave the note to plaintiff, is a denial of the allegation in the petition that the defendant made the note, so far as making includes delivery, and also of the further allegation that the defendant delivered the note to plaintiff. Sawyer *v.* Warner, 15 Barb. 282. Circumstances of aggravation are not traversable. Gilbert *v.* Reynolds, 14 How. 46. Nor are averments of special damages traversable, Molony *v.* Dows, 15 How. 261; S. C., 2 Hilt. 247; unless they are the gist of the action, and then a general denial would be proper. Perring *v.* Harris, 2 Mood. & Rob. 5.

Every fact impliedly averred in the petition may be traversed by the answer, the same as if averred expressly, Prindle *v.* Caruthers, 15 N. Y. 425, see also 41 N. Y. 116; Haight *v.* Holley, 3 Wend. 258; Chambers *v.* Jones, 11 East, 406; Lord *v.* Chaseborough, 4 Sandf. 697; and if not so traversed, it is admitted. Arnold *v.* Conklin, 25 N. Y. 470. In trespass alleged on a particular day, if the defendant justifies a trespass on a different day, he should deny that he was guilty on the day stated in the petition; and this can be done by adding to the plea of justification the old form of traverse, to wit: "*Without this, that he was guilty of said trespass on the said day of in petition mentioned, or on any other day than on the day herein mentioned.*" So where the action was for negligence in leaving a hole open into which plaintiff fell, an answer denying "that the plaintiff, without any fault or want of care on his part, did fall therein," was held to put in issue both the falling and the exercise of proper care by the plaintiff. Wall *v.* Buffalo Water-works Co., 18 N. Y. 119; Livingston *v.* Ham-

mer, 7 Bosw. 670. Where written or other contracts are set forth in a petition, if the defendant claims that they are not correctly stated, he must deny the allegations of the petition, or that he ever made the agreement set forth in the petition. Where there is a written agreement, the pleader can make no averment contrary to the legal effect of the instrument. Any such averment is a nullity. United States *v.* Thompson, 1 Gall. 388. So, too, where the petition alleges the execution of a bond setting forth the condition and alleging the execution of a mortgage as collateral security for the same debt, with the same condition as is in the bond, an answer alleging the words of the condition, as stated in the petition, and averring that it was not contained in the mortgage, is not a denial that such was in substance the condition of the mortgage. The correct method for defendant to have brought the question which he wished to raise before the court, was to set out the mortgage *verbatim*, and then to have stated the matter in avoidance, which, upon his construction of the mortgage, would have barred the action, or he might have denied the execution of the alleged mortgage. Either of these methods would have raised the question of law arising upon the instrument; but an averment that a certain clause is not contained in the mortgage, without giving its actual language, does not afford sufficient data for determining its legal effect. Simon *v.* Dunn, 15 N. Y. 498; S. C., 8 How. 16.

A positive denial of fraud in an answer will not prevail against admissions in the same pleading of facts, which show that the transaction was fraudulent. Robinson *v.* Stewart, 10 N. Y. 189; Storer *v.* Coe, 2 Bosw. 662; Manico *v.* New York Dry Dock Co., 3 Edw. Ch. Rep. 143.

What may be offered in evidence under a general denial.—Where the petition set out an agreement for services at fifteen dollars per week, and then averred that defendant was indebted in the sum of $333.07, being the balance remaining due, after sundry payments made by the defendant to the plaintiff, and a general denial was interposed, the court held that on this issue the defendant was authorized to prove payments made. Quin *v.* Lloyd, 41 N. Y. 349. This decision seems to be founded on the fact that the plaintiff declared for $333.07, balance of a larger sum; a denial of the petition raised the question how much was due; hence on that issue payment was material. This case is distinguished from the case of McKyring *v.* Bull, 16 N. Y. 297, though it would seem hardly ground for any distinction. The English plea of never indebted requires, if the indebtedness is admitted, that payments should be

specially pleaded, and this mode of pleading seems more consistent with the code, and more intelligible and logical. The first denies the *existence* of the debt at any time; the second, admitting the debt, shows facts, happening subsequently, which show the indebtedness extinguished.

In an action for the conversion of personal property, a general denial puts in issue both the conversion and plaintiff's title to the property; and, under it, evidence to disprove plaintiff's title is admissible. Robinson *v.* Frost, 14 Barb. 536.

In an action to recover damages for a wrongful conversion of personal property, the complaint alleged that at the time of the conversion the plaintiff was the owner, and entitled to the immediate possession of said property; the answer denied that at the time of the alleged conversion the plaintiff was the owner and entitled to the immediate possession thereof. It was held that under this denial the plaintiff's title was put in issue, and that it was competent for the defendant to show title vested in a third person. Davis *v.* Happoch, 6 Duer, 254. So in a real action under the issue raised by a general denial, the defendant may introduce evidence showing title out of the plaintiff and in a third person. Raynor *v.* Timerson, 46 Barb. 518. But in an action of trespass to real estate, the petition being in the usual form, a general denial admits the plaintiff's title. Squires *v.* Seward, 16 How. 478; Althouse *v.* Rice, 4 E. D. Smith, 347; Ferris *v.* Brown, 3 Barb. 105.

Where the action is simply for a *quantum meruit*, evidence may be given under a general denial, showing that the work was unskillfully done, or was worth less than the amount claimed. Raymond *v.* Richardson, 4 E. D. Smith, 171; Bellinger *v.* Craigue, 31 Barb. 534; S. C. approved, Gates *v.* Preston, 41 N. Y. 113, 116. The rule is different where there is a contract price. Kendall *v.* Vallejo, 1 Cal. 371. Matters in mitigation in Ohio may be given in evidence on an inquiry of damages, or on a general denial. Bush *v.* Critchfield, 5 Ohio, 109, 113; Wilson *v.* Apple, 3 Ohio, 270; Dewitt *v.* Greenfield, 5 Ohio, 225; Fisher *v.* Paterson, 14 Ohio, 418, 424; Haywood *v.* Foster, 16 Ohio, 88; Stearns *v.* Cox, 17 Ohio, 590; Van Derver *v.* Sutphen, 5 Ohio St. 293; Reynolds *v.* Tucker and wife, 6 Ohio St. 516. Such is the rule everywhere, I believe, save in the State of New York.

In an action for malicious prosecution, averring want of probable cause, a general denial puts that fact in issue. Rost *v.* Harris, 12 Abb. 446; Radde *v.* Ruckgaber, 3 Duer, 684; Simpson *v.* McArthur, 16 Abb. 202. So to an action charging defendant with keep-

ing a ferocious dog, a general denial was held sufficient to allow the admission of evidence showing defendant's want of knowledge as to the ferocious character of the dog. Hogan *v.* Sharpe, 7 Car. & Payne, 755.

The general denial allowed by the code, corresponds very nearly to the general issue in actions of assumpsit, debt, and tort at common law; it raises the question of liability on the case made in the petition. McKyring *v.* Bull, 16 N. Y. 297. Its effect is to cast the burden of proof on the plaintiff, and if the necessary evidence is given, and the answer contains only a general denial, the plaintiff is entitled, of course, to a verdict and judgment. Texier *v.* Gouin, 5 Duer, 283. So under a general denial, a distinct affirmative defense can not be given in evidence. A party in such a case is limited to a contradiction of the plaintiff's proof, and to the disproval of his case. Beaty *v.* Swarthout, 32 Barb. 293.

No defense which confesses and avoids the cause of action, can be given in evidence as a defense under a general denial. McKyring *v.* Bull, 16 N. Y. 297. Where a petition alleges a cause of action existing by virtue of a particular statute, an objection to the validity of such statute, which is not apparent upon the act itself, can not be taken under a general denial; it should be distinctly set forth in the pleading. Darlington *v.* Mayor, etc., of New York, 31 N. Y. 164; S. C., 28 How. 352.

Under a general denial, the defendant can not insist that the plaintiff has not a legal capacity to sue, where that fact does not appear on the face of the petition, Dellage *v.* Parks, 31 Barb. 132; Calif. Steam Nav. Co. *v.* Wright, 8 Cal. 585; or that there is a defect of parties plaintiff. Abbe *v.* Clark, 31 Barb. 238. So in an action of trespass, that he had a license to enter on the premises, Haight *v.* Badgeley, 15 Barb. 499; nor in an action for conversion can he show a license. Beaty *v.* Swarthout, 32 Barb. 293. Nor on such denial, in an action for conversion, can the defendant show a special property in himself to the goods, Graham *v.* Harrower, 28 N. Y. 165; nor can one defendant in the same action prove that, as sheriff, he levied upon the property before plaintiff set up any title. Ib. Payment can not be proved under a general denial, Morford *v.* Davis, 28 N. Y. 481; Fay *v.* Grimstead, 16 Barb. 321; Gould *v.* Segee, 5 Duer, 260; Field *v.* Mayor, etc., of New York, 6 N. Y. 189; Collins *v.* Packer, 21 Barb. 275; nor that the time has been extended and not yet expired. 16 N. Y. 297. So of coverture, Pastreo *v.* Gavelle, 4 E. D. Smith, 425; Newell *v.* Solomons, 22 Barb. 647; nor that there has been an award or recovery for the

same cause, Brazill *v.* Isham, 12 N. Y. 17; Hendricks *v.* Decker, 35 Barb. 298; nor illegality in contract, Potts *v.* Sparrow, 3 Dowl. P. C. 630; nor the incorporation of a domestic corporation, East River Bank *v.* Rogers, 7 Bosw. 493; Bank of Genesee *v.* Patchin Bank, 13 N. Y. 309; nor that the plaintiff is not the real party in interest, Jackson *v.* Whedon, 1 E. D. Smith, 141; S. C., 3 Code, 186; nor that the suit was commenced before the cause of action accrued. Smith *v.* Holmes, 19 N. Y. 271. This case does not squarely decide the question: the suit was on a bond, payable in a certain time, with annual interest; on demurrer the court held that if any interest was due, the plaintiff was entitled to judgment for that. Under our practice, the question would appear on the petition, and could be reached on demurrer, or if the petition was so drawn as not to show the fact, it must come up on a general denial. On that issue he is bound to prove a debt due and payable, or he will not support his petition.

These examples will afford hints to the pleader of the necessity of being careful in framing his issues, if he does not want to fall into difficulty in the progress of the suit. There are more mistakes made by inserting too much than too little in the answer. In an action at law, the object is to frame a single and distinct issue, so that the jury may not misunderstand on what they have to pass. The answer should never contain any admissions, as what is not denied is admitted; but in making admissions, you may admit too much, more than there is in the pleadings, and be compelled to pay a bill of costs to escape the difficulty the admission involves your client in. I have seen examples of just such blundering, and the unpleasant consequences growing out of it. It is useless to admit what is in the petition, if you can not deny it; but it is dangerous to make admissions, lest you go beyond the statements of the petition, and find them turned against your client, to his great injury. Every pleader should understand that the code does not admit of admissions of facts or evidence; but that what is not denied is for that case to be taken as admitted, and yet it is an admission which will not estop him in any other action, whereas an answer making admissions might be used against him in another case. Let the denial be general, if the truth will admit of it; if not, then frame your specific denials on such averments as the facts justify, and make the denial a simple and flat denial of the particular averment in as few words as possible. If such care was taken, pleadings would be much shorter than in fact they are, and more intelligible to the court and the jury.

An answer which avers that the plaintiff is not the lawful holder and owner of the note mentioned in the petition, is sufficient to admit evidence that plaintiff is not the owner or holder, Seeley *v.* Engell, 13 N. Y. 542; White *v.* Spencer, 14 N. Y. 247; nor is it frivolous to allege that A B is, but that the plaintiff is not, the real party in interest. Arrangaiz *v.* Trunzer, 2 Hilt. 244. Where the petition sets up a contract which will be void, if not in writing, an answer which merely denies the contract is sufficient. This was the rule in chancery; and the denial compels the plaintiff to prove a valid contract. In such a case is it necessary to plead the statute of frauds? Livingston *v.* Smith, 14 How. 490; Armburger *v.* Marvin, 4 E. D. Smith, 393; Chaplin *v.* Parish, 11 Paige, 405; Cozine *v.* Graham, 2 Paige, 177; Ontario Bank *v.* Root, 3 Paige, 478; Harris *v.* Knickerbocker, 5 Wend. 638. As to pleading a want of consideration, *vide* Clancy *v.* Piggott, 2 Ad. & El. 473.

THE STATEMENT OF NEW MATTER.

The statement of new matter must be predicated upon the existence, at some time, of a valid cause of action. In actions on contracts, it must admit its execution and its original validity, or to speak more accurately, that it was not, in its inception, *void;* because a voidable contract is valid until avoided. So in actions for torts, it must admit the trespass, the conversion, the libel, the slander, or other wrong set up. Having admitted the once legal existence of the plaintiff's cause of action, the answer proceeds to state such new matter as shows that, at the commencement of the suit, the plaintiff had no right to recover against the defendant on this once existing cause of action. The code in this respect requires special pleading beyond what the old practice did. Many defenses, which formerly could be proved under the general issues of *non assumpsit*, *nil debet*, and not guilty, must now be set up specially in the answer. All matters which assume the existence of a legal cause of action at some prior time, but insist upon facts which show no present right to recover, must be set up in the answer. Thus, in an action arising on contract, all matters which admit that a *sufficient contract* was made, or that there was once a cause of action, but avoided by subsequent matter—as release, parol discharge, alteration in the terms of the contract without consent, non-performance by the plaintiff of a condition subsequent, contract become illegal or impossible to perform, insolvent discharge of defendant, accord and satisfaction, tender, arbitrament, former recovery, higher security given, statute of limitations, set-off, pay-

ment, performance, infancy—must be set up in the answer; also, in an action for a wrong or injury, all matters which admit the commission, but *justify* or *excuse the act*—as in trespass, distress for doing damage, license, right of way, inevitable necessity, title in a third person—and all matters showing a discharge, must be so set up. So also must the facts which show that plaintiff has no legal capacity to sue, that the court has no jurisdiction of the action, that another action is pending, where these facts do not appear on the face of the plaintiff's petition. Or to state the rule in brief terms, whenever the defendant can not deny the facts, or some material one of them, which the plaintiff alleges in his petition, he can defend only by new facts to be by him set up in his answer.

What, then, must be the legal effect of these new facts, of this new matter, which the defendant can set up in his answer? We at present lay out of consideration the subjects of set-off and counterclaim, as they are not legitimately *defenses*, in the strict technical meaning of that term as used in the code. They are strictly cross-actions, and justify a finding for both parties, and a judgment in favor of the one to whom an excess is found due. They do not defeat the plaintiff's cause of action; they meet the plaintiff's claim by one in favor of the defendant against the plaintiff, and ask that both causes may be tried at the same time, and judgment be given only for the party to whom any balance may be found coming. But the new matter we now are to treat of, is such matter as shows that the plaintiff has no right to recover on the cause of action stated in his own petition. It contains no new cause of action in favor of the defendant against the plaintiff; it goes directly to defeat the case made by the plaintiff. McKyring *v.* Bull, 16 N. Y. 297.

The code divides the new matter into three classes:

1. *Such as constitutes a defense.*
2. *Such as constitutes a counterclaim.*
3. *Such as constitutes a set-off.*

And we will consider these in their order.

1. Under this head it is not every matter that can be set up in an answer, the *matter set up must constitute a defense* to the plaintiff's cause of action. Admitting it to be true, it must show that the plaintiff has no right to recover in this action against the defendant. In the language of the books, it must be such matter as will bar the right of the plaintiff to recover for so much as the answer covers. Marvin, P. J., in Houghton *v.* Townsend, 8 Pr. 441,

says: "It is quite clear that the word "defense" in the code is not used in its legal, technical sense [he had shown this to be *denial*]. It has no application to that part of the answer which contains *denial* only of the facts stated in the complaint; but it is used in reference to the statement of new matter; and it must be such new matter as constitutes a *defense;* and the question is, must it be matter which constitutes a complete *bar* to the action? In common parlance the word "defense" is used as applicable to any facts which defeat the action wholly or in part. These new facts, then, can not be set up unless in law they are an answer to the plaintiff's cause of action, and a bar to it." Graham *v.* Stone, 6 Pr. 15; Smith *v.* Wait, 7 Pr. 227.

Must the facts cover the whole cause of action? or can they be set up if they show only a partial bar to the same? We suppose that the answer must cover the whole cause of action; but it may do it by one set of facts as to a part, and by another as to the residue. For instance: The plaintiff declares for a sum of money; the defendant can plead payment as to a part, and tender as to the residue; or a payment of part and a release of the balance. So he may plead payment as to a part, tender as to another part, and not indebted beyond the sums so paid and tendered. In such cases, the answer covers the whole cause of action, and shows that the plaintiff has no right of recovery. The answer, however, must be special, averring that, as to such a portion of the sum demanded, he has paid it; that as to such a part of it, he has tendered it before suit brought; and that as to the residue thereof, he does not owe the same to the said plaintiff. This view of the code is taken in the case of Houghton *v.* Townsend, 8 Pr. 441. "I do not understand," says Marvin, P. J., in that case, "that payment or set-off can now be shown, when the answer is simply a denial of the complaint. A partial payment or set-off is, in common parlance, a defense *pro tanto;* and how is the defendant, by his pleading, to avail himself of such defense? In the present case, the plaintiff argues that the defendant should have pleaded payment as formerly, that is, full payment, thus stating facts which would bar the action; and he refers to authorities to show that under such pleadings, if the defendant, on the trial, proved the payment of any sum, he would succeed upon the issue, unless the plaintiff proved a larger sum due, and that he would then only recover the balance. See 5 Hill, 290, 393. But is this the system of the code? Was this the design? The commissioners say: 'We propose that the plaintiff shall state his case according to the facts, etc.; that the

defendant shall by his answer point out his *defense* distinctly.' It was also an important part of the system of the commissioners, that pleadings should be verified. Could it have been intended, in a case where the defendant owed the plaintiff a thousand dollars, and had only paid him on account of such debt one hundred dollars, that he should when sued (the whole $1,000 being claimed) be compelled to answer and state generally, as new matter, that he had paid the debt or demand, and then swear to the truth of his answer, when he knew that he still owed the plaintiff $900 of the original demand? I do not think such was the intention." It would seem that there could be no doubt as to the absolute necessity of such a mode of defense under a code which requires all pleadings to be under oath. So a party may plead payment as to part, and offer judgment as to the residue.

Where the petition contains more than one count or cause of action, the defendant may plead to the whole action, or he can plead to each count separately. In so doing his pleas must be an answer to all he undertakes to answer. If they are an answer to one count, and not to another, they will be bad if the answer assumes to answer the whole action. Where the same defense lies to all the causes of action, the answer may cover the whole action by a single plea, or statement of facts constituting a defense; but where separate and distinct defenses lie against the several causes of action, there the answer must limit and confine each plea or statement to the particular count to which it applies.

What is the New Matter?

We do not propose to go into the various defenses which may be set up. Where the action is founded on a common-law right, all defenses which could have been specially pleaded at common law, can and must be so pleaded under the code. Hence so far as such causes of action are concerned, a reference to Chitty's Pleading will give all the information required. It would extend the plan of this work too far, to undertake to write a treatise on the legal rights of parties, and to point out what does or does not amount to a bar to a cause of action once existing.

But the code introduces a new feature into the defense of a legal action; the defendant may set up an *equitable defense* to a legal claim. Where the plaintiff's claim is one of an equitable character, there such a defense was always admissible, as well as any legal defense which might exist. It is only where the claim of the plaintiff is a legal one, that any mistake can be made as to the pur-

port of this new species of defense. Let us then consider the subject in this single aspect at present.

The equitable matters to be set up must constitute grounds of *defense*. They must go to defeat the plaintiff's right to recover on that cause of action. It is not, therefore, every equitable claim which the defendant has against the plaintiff that can be set up; it is only such an equitable claim as will defeat the plaintiff's recovery. It may be illustrated by reference to the old practice. A brought a suit on a note against B and C, on which C was surety. C was compelled to go into equity to obtain an injunction against the plaintiff, if he wished to obtain the benefit of acts which in equity released him. Now he can plead these facts directly to the action, and if found true they will prevent a recovery. The rule may be thus stated: Central Ins. Co. *v.* Nat. Prot. Ins. Co., 14 N. Y. 85, 80.

In all cases where, upon the facts to be stated, a court of equity would have granted a perpetual injunction against the collection of the plaintiff's claim, the defendant may set up such facts as a *defense* to the action itself. But unless the new equitable matter goes to defeat the plaintiff's right to recover, in part or in whole, it can not be set up as an equitable matter in defense; because it is no bar to any part of the plaintiff's claim. It must be some matter which shows that in equity the plaintiff had no right to bring his action. If the matter sought to be set up presupposes an existing right of action in the plaintiff, and seeks to get rid of it by some equitable claim which the defendant has against the plaintiff, it can not be set up as a *matter of defense;* whether it can as matter of counterclaim, or not, is a question hereafter to be examined and need not be discussed here. If the new matter set up requires the action of the court affirmatively, in behalf of the defendant, to render it available in the action, then it can not be matter of *defense*, as that term has already been expounded and defined. It may be a counterclaim; but it is no matter of defense. As where an action is brought to recover real estate which the defendant has made a contract to purchase. Here, if he has not the title, he can not defend the action; though he may have a cause of action against the plaintiff to compel him specifically to execute the agreement. In such a case the defendant must become an actor, he must obtain a judgment against the plaintiff on his equitable demand, before it will avail him as any defense to the plaintiff's action. This may be a counterclaim; it is no new matter constituting an equitable defense. To this extent an equitable defense

may be made available to defeat an action founded on a legal right and no further.

The question here presented is one of great practical importance to the right construction of the code, and its harmony in practice. Equitable *defenses* can now be interposed in actions at law. This provision was first introduced in England in 1854, by the common-law procedure act. By that act courts of law were authorized to entertain jurisdiction of equitable defenses. Our code, section 93, enacts that "the defendant may set forth in his answer as many grounds of *defense*, counter-claim, and set-off as he may have, whether they be such as have been heretofore denominated legal or equitable, or both." It will thus be seen that the English act and the code employ the same terms substantially; it is a *defense*, and it is to be an *equitable* defense. This was a term well understood when the act of 1854 was passed in England, and the code in this country. The English act had received a definite and distinct construction before the same provision was adopted in the United States; and it is a rule of construction that, in adopting the statutes of England, or of other States, we also adopt the construction that has been put upon them by the courts of that country or state. Pennock & Sellers *v.* Dialague, 2 Peters, 1. When one State enacts a statute of another State, it is presumed to adopt the construction which that statute has received by uniform series of judicial expositions in the latter State. Campbell *v.* Quinlin, 3 Scam. 288. Such is the rule of construction to be applied to the code, and by it the construction given to the same provision in England is to be given to it here. Now, the English courts say that this language means that that only can be pleaded, as if proved, would be a simple bar to the action, and entitle the defendant to the common-law judgment, "that the plaintiff take nothing by his writ, and that the defendant go hence without day," which will, in effect, be equivalent to a perpetual injunction in a court of equity. If the facts stated by way of equitable defense are proved, I can not doubt but that a court of equity would grant a perpetual injunction. Per Mellor, J., Jeffs *v.* Day, L. R., 1 Q. B. 372. So in Wadehouse *v.* Farebrother, 5 E. & B. 277, it was held that a plea on equitable grounds could only prevail where, followed by a common-law judgment, it would do complete and final justice. And in Flight *v.* Gray, 3 C. B., N. S. 320, it was decided that an equitable defense is only admissible where it sets up matter in respect of which a court of equity would have granted relief unconditionally. In the case of Mines Royal Societies *v.* Magnay,

10 Exch. 487, the court of exchequer refused to allow the equitable plea set up to be pleaded, on the ground that a court of equity would require the execution by the defendant of a valid surrender of a term, as a condition precedent to staying the execution, and that a court of common law had no power to enforce such a condition. In Wood *v.* Copper Mines Co., 17 C. B. 561; S. C., 84 Eng. C. L. 560, 590, Jervis, C. J., says: "Without attempting to define the form or the precise circumstances under which a court of law will admit an equitable plea to inure as an answer to an action, it is plain that, inasmuch as a judgment for the defendants here would bar the action, we can not hold this to be a good equitable plea, unless it discloses a case in which a court of equity would grant a perpetual, unqualified, and unconditional injunction. Whether that test is applicable in all cases, it is not now necessary to inquire. No doubt, in this, as in all cases, the court will not admit an equitable plea that would carry the legal defense further than a court of equity would extend its protection to the party." In the case of Flight *v.* Gray, 3 C. B., N. S. 320, Cockburn, C. J., said: "Section 83, we think, only enables the defendant to plead by way of equitable defense such facts as would entitle him to absolute and unconditional relief in a court of equity. It only applies where this court can deal out the same measure of justice between the parties as the court of equity would do. It seems that, under the circumstances of the case, a court of equity would compel the defendant to do justice; that is, to give the renewed bill, and pay the ten per cent. discount, before they would restrain the plaintiff's proceedings at law." In the case of Gee *v.* Smart, 8 E. & B. 313, 319, Coleridge, J., says: "The question is, however, whether this is such a plea as, under section 83 of the common-law procedure act, 1854, we are authorized to receive. And several cases have decided that, to make it such, the facts it discloses must entitle the defendant to an absolute and perpetual injunction against the judgment which the plaintiff might otherwise have obtained at law. If our common-law judgment on the plea of the defendant will not do final justice between the parties, but the plea is in the nature of a bill in equity, calling upon the court for that sort of conditional and manifold award which is in the nature of a decree in equity, and not a judgment at law, we can not entertain it, because we have no authority to pronounce, or machinery to enforce such an award." The action in this case of Davies *v.* Marshall, 10 C. B., N. S. 697, was for obstructing lights by erecting a new house and raising the walls higher than

the old; an answer was interposed that it was done with the knowledge and acquiescence and consent of the plaintiff; reply that the acquiescence and consent was obtained by fraud and misrepresentation. A demurrer was interposed to the reply, and the court held it a good equitable reply to the plea of estoppel, on the ground that it showed that the estoppel did not avoid the party pleading it, if it was obtained by fraud. The estoppel was an equitable defense, and the reply of fraud was an equitable avoidance of the equitable plea.

It is clearly settled by these cases and others that a pleading, to be good on equitable grounds, must be such as to show what would in a court of equity be a complete answer to the claim or defense, and would, as such, afford ground for a perpetual injunction granted absolutely and without any conditions. Such it is and was since the passage of section 83 of the English act of 1854, allowing equitable defenses to be plead as a bar to a legal action. And no other construction could be given to either the English statute or our code. The matter set up must be a *defense*, that is, some fact, which shows that the plaintiff ought not to recover in any form or aspects of the facts. It must not be a matter where anything is to be done by the party pleading, in order to make it equitable, that the plaintiff should not recover. This equitable matter then must ask for no relief, but, like a legal plea, must in equity defeat the right of the plaintiff to recover on the simple statement of the facts. If a court of equity, before enjoining an execution on the judgment, had to require the plaintiff in equity, defendant at law, to do any act whatever, then it is not matter of defense, but matter on which a party might go into equity, and, upon doing what first in equity he ought to do, obtain a perpetual injunction.

Such must be the construction of our code, because only such equitable matter can be a defense in the legal acceptation of that term. But it may be said that the English cases do not apply, since our courts have both common-law and equity jurisdiction. This, however, can not alter the construction to be given to the same words. The code fully recognizes the distinction between law and equity, and cases founded on legal principles are to be commenced, proceeded in, tried, and judgment rendered as in actions at common law, and cases founded on equity principles are to be commenced, the summons served, the case proceeded in, and judgment rendered, as formerly in a suit in equity. Though the same court administers relief in both forms, yet the forms are different, the pleadings different, and each is not adapted to the

remedy demanded in the other form. A judgment in an action for the recovery of money only is still a judgment for money only, and for nothing else; while a case founded on principles of equity, and assuming the forms and the proceedings of an old bill in chancery, has alone the flexibility so essential to relief granted in equity. The one remedy is not capable of reaching the relief demanded in the other. It is not, then, the *fact* that separate courts administer the different kinds of relief; it depends upon the *nature* of the two remedies, which are so unlike and incompatible the one with the other. The one is rigid as iron; the other flexible as India-rubber; the one calls for money *only*, and the other varies to meet the thousand variations of the cases presented.

It is clear, then, that the equitable facts, which can be pleaded as a defense to an action founded on legal principles, must be such as the English courts have decided they must be. They must present a complete and perfect defense, so that when judgment is rendered on such a plea for the defendant, complete justice has been rendered, as complete as it would have been if the case had been presented to and decided by a court of equity. As a *defense* the answer must lead to such a result, or it is not a defense.

I now confine myself to an *equitable defense.* I have no reference to what might have been done formerly in equity by a cross-petition, and now, in certain cases, under an answer amounting to what was once a cross-petition.

I might here refer also to the case of Waterlow *v.* Bacon, L. R., 2 Eq. Cas. 514, where relief was granted in equity, because it could not be done at law. The court held that after pleading an equitable defense at law, the party could not come into equity on the same facts, provided a court of law could give such relief as a court of equity would give. Sir R. T. Kenersley, V. C., said: "Now it appears to me, on the authorities referred to, that the rule on the subject is this: if a defendant in an action thinks fit to plead an equitable plea, he can not come to this court for an injunction to restrain the action on the very ground which he has made the subject of his equitable plea, provided always that case is of that nature and the form of the pleading at law is such that the court of law can and will give such relief on the equitable plea, supposing it established, as this court will give. But if the court of law can not give such relief, or if from the mode in which the pleadings are framed, the matter of the equitable plea may never come on for the decision of the court of law, then this court will not refuse to entertain a bill for an injunction to restrain the

action, merely on the ground of the plaintiff in equity having pleaded such equitable plea in the action; though, of course, in such case this court will deal with the question as to the costs of the action, and especially as to so much thereof as may have been caused by pleading the equitable plea." This case agrees fully with the above cases at law, and shows clearly when a court of equity will take jurisdiction of a case. In this case the plaintiff in equity had to do certain things before he had a right in equity to enjoin the action at law, and this fact drove him to a new suit in equity.

Under the code, whatever facts would sustain formerly a bill in chancery will now sustain a petition founded on principles of equity. The code has abolished no rights of action, whether at law or in equity; it has only declared that all remedies heretofore existing in any form shall be called a *civil action;* but that the same relief shall be attained by a civil action, as was prior thereto attained by both a common-law action and a bill in equity. The name is changed; the thing is left as it was; and though the same name applies to both remedies, yet the remedies remain as distinct as they did before, and the proceedings in the two classes of cases as unlike as the proceeding at law to the proceedings in equity. The same doctrine is maintained in the case of Wood *v.* Seeley, 32 N. Y. 105. The court here entertain a petition for an injunction to restrain the defendant from suing. It was claimed that here was a defense to the action of the widow to recover her dower, if one was brought, and therefore no action could be maintained on facts which now constituted a defense to the threatened action. It was claimed that such defenses did not constitute a cause of action: 1. Because mere matter of defense does not constitute a cause of action, except in equity, where no legal defense can be made available. 1 Story's Eq., sec. 684; Murray *v.* Graham, 6 Paige, 622; Obourn *v.* Taylor, 5 Paige, 515; Mitchell *v.* Oakley, 7 Paige, 68. But such distinction has been removed by the code (sec. 150); an equitable defense is now equally available. Dobson *v.* Pearce, 2 Kern. 156; Crary *v.* Goodman, Ib. 266; Trophagan *v.* Trophagan, 40 Barb. 538. Hence a mere matter of defense is not now a good cause of action in any case. Van Santvoord's Pl. 505; Phillips *v.* Graham, 17 N. Y. 270; Harman *v.* Remsen, 23 How. 174. But the court held that the action would lie, and overruled the above views of counsel. This case goes quite as far as the English case. There was a double aspect to the peti-

tion, with one aspect of which the facts would not constitute an equitable defense, as the court had something to do which a court of law could not do.

This distinction between equitable matter, which constitutes a *defense*, and that which constitutes a *claim for relief*, which relief, when obtained, may involve as a part of it a perpetual injunction against an action, is very important; as upon this distinction rests all clearness in expounding the code, and in administering the law under it. Unless the distinction is observed, and that rigidly, nothing but confusion can follow, as we know from experience. Where the new equitable matter is a *defense*, as that term has been defined, it is to be tried as the main case is by a jury; but where the equitable matter is such as constitutes grounds for a relief, which may involve a prohibition against the plaintiff's proceeding in his action, the answer, if it can be raised in that shape, becomes a new petition for relief, which admits the plaintiff's cause of action, and hence puts an end to that; and a new case grows up out of the first, which is a case for equitable relief, not a defense to the plaintiff's action.

And how is this new case to be tried? By a jury, because it is attached to or rather issues out of an action founded upon principles of strict law, or by the court, because the whole case in dispute is one entirely of equitable jurisdiction? This is a contingency the code has made no provision for, and hence would seem to be a contingency never contemplated by its authors. The truth is, the code only looks to equitable matters which constitute a defense. It nowhere contemplates or provides for the case of setting up in an answer grounds for affirmative relief; though that relief, when obtained, may as a result put an end to the plaintiff's further prosecution of his action. How would stand such a mongrel case? Here would be the plaintiff, with his legal claim, entitled to a trial by jury; on the other hand would be the defendant, with his case in equity, with which a jury had nothing to do. All issues of facts arising *in actions* for the recovery of money, or specific real or personal property, must be tried by a jury. Any issue of fact, therefore, arising in such a case, would have to be tried by a jury, because the *action* is for the recovery of money, or specific real or personal property. And then this absurdity follows, that the case would be tried by the court or a jury, just as the one or the other party first commenced his action. For example: A sells real estate to B, retaining the legal title; a dispute arises as to its execution; if A brings an action to recover the possession of the land

on his legal title, and B sets up his contract, the case must be tried by a jury, as the issues arise in an action to recover specific real property; but if B commences an action for the execution of the contract, then it will be tried by the court, as the issues of fact will not arise in an action for the recovery of money, or specific real or personal property. Is it possible that the *learned* codifiers designed or contemplated any such absurdity? This aspect of the case shows pretty clearly that all that was meant by this equitable matter, whether as a defense or counterclaim, was such matter as defeated the plaintiff's action, and appertained for trial to the same forum as the action itself. If such is not the construction to be given to the code, then we would like those *learned improvers* to tell us what they did mean. Our own impression is, that copying as they did from others, they would be as much in the fog as to the real import and meaning of this provision of the code as those of us who are honestly laboring to work out something practicable from it. Were it not that the code implies more than it enacts, it would be impossible to get along a step with it. It implies that a law of pleading already exists, to which reference can be had, and by which language is to be interpreted. The code only abolishes the *forms* of pleading, not principles. Kneedler *v.* Sternbergh, 10 Pr. 67. And it is this system of truth and logic and common sense which underlies the code that is our only safe-guide in expounding and construing it. The code is to be construed as a whole, supposed to be consistent in all its parts; and where no provision is made for the trial of an action in a particular form, it is to be presumed that an action in that form was never contemplated, and hence is not permitted.

As to what is new matter, I will refer to Gilbert *v.* Cram, 12 How. 455; Rodde *v.* Reechgaber, 3 Duer, 684; Brazill *v.* Isham, 12 N. Y. 17; Bellinger *v.* Craigue, 31 Barb. 534; 41 N. Y. 116; Carter *v.* Koezley, 14 Abb. 147; Wolrod *v.* Bennett, 6 Barb. 144. And what is not: Rost *v.* Harris, 12 Abb. 446. Where a petition averred that the note had not been paid, and the answer averred that it had been paid, it was held not new matter needing a reply. Van Gieson *v.* Van Gieson, 12 Barb. 520; S. C., 10 N. Y. 316; McKyring *v.* Bull, 16 N. Y. 297, 304.

New matter must be pleaded, whether legal or equitable, and the facts constituting the defense be distinctly averred, so that it shall distinctly appear on the face of the answer that the facts pleaded do constitute a legal defense to the action. Taylor *v.* Richards, 9 Bosw. 679; Dennis *v.* Snell, 54 Barb. 411; S. C., 34 How. 467; 50

Barb. 95; Catlin *v.* Gunter, 1 Duer, 266; S. C., 11 N. Y. Leg. Obs. 201; S. C., 11 N. Y. 368, 371; Ayrault *v.* Chamberlain, 33 Barb. 229; S. C., 31 N. Y. 614; Jacob *v.* Remsen, 12 Abb. 390; S. C., 35 Barb. 384; 36 N. Y. 668.

New matter constituting a defense must be contained in the answer, otherwise the defendant can not avail himself of it. Morrill *v.* Irvin Tin Ins. Co., 33 N. Y. 429; Tilson *v.* Clark, 45 Barb. 178; Fry *v.* Bennett, 28 N. Y. 325; Rapalee *v.* Stewart, 27 N. Y. 310; Allen *v.* Mercantile Ins. Co., 46 Barb. 642; Kelsey *v.* Western, 2 N. Y. 501; N. Y. Central Ins. Co. *v.* National Protect. Ins. Co., 14 N. Y. 85; Baker *v.* Bailey, 16 Barb. 54; Dewey *v.* Hoag, 15 Ib. 365; Walton *v.* Minturn, 1 Cal. 362; Field *v.* Mayor, etc., of New York, 6 N. Y. 179; Bucknam *v.* Brett, 13 Abb. 119; S. C., 35 Barb. 596; Sandford *v.* Travers, 7 Bosw. 498; S. C., 40 N. Y. 140; Button *v.* McCauley, 38 Barb. 413; S. C. reversed, 5 Abb. N. S. 29; Wright *v.* Delafield, 25 N. Y. 266. Nor will the fact benefit the defendant, though it appears in plaintiff's evidence. Dengeldein *v.* Third Ave. R. R. Co., 9 Bosw. 91; S. C., 37 N. Y. 575. But where the plaintiff voluntarily shows he has no cause of action, the rule seems otherwise. Ely *v.* Cook, 2 Hilt. 406; S. C., 9 Abb. 366; 28 N. Y. 365. Where new matter, not properly pleaded, is improperly received in evidence on the trial, without objection on the part of the plaintiff, the court, in giving judgment, must take it into consideration. N. Y. Central Ins. Co. *v.* N. Prot. Ins. Co., 14 N. Y. 85. An answer is frivolous, which merely avers that the note sought to be recovered on was obtained by fraud, and does not aver any facts showing the existence of the fraud. McMurray *v.* Gifford, 5 How. 14; Seeley *v.* Engell, 13 N. Y. 542.

Confessing and avoiding.—A defendant, in his answer of new matter, in order to avoid a cause of action, need not confess it. He has the right to say: "I deny your alleged cause of action, but if you shall succeed in proving it, still I am not liable, because," etc. Taylor *v.* Richards, 9 Bosw. 679. *Contra:* Gregory *v.* Trainer, 4 E. D. Smith, 58; S. C., 1 Abb. 209. See also Anibal *v.* Hunter, 6 How. 255; Sayles *v.* Wooden, 6 How. 84; Arthur *v.* Brooks, 14 Barb. 533. It will be sufficient in the answer to refer to the cause of action as the *supposed* cause of action, Eavestaff *v.* Russell, 10 Mees & W. 365; or to say the supposed cause of action, if any there be, McCormick *v.* Pickering, 4 N. Y. 280; or to say the sum claimed. Scodding *v.* Eyles, 9 Ad. & El. 489; Margetts *v.* Bays, 4 Ad. & El. 489. But the true rule is to allow the defendant to put in as many defenses as he may have, whether consistent with each other or not. Stiles *v.* Comstock, 9 How. 48. Thus, in an

action of slander, he may deny the charge and justify at the same time. Butler *v.* Wentworth, 9 How. 282; S. C., 17 Barb. 649.

II. *Counter-claim.*

This is a new term translated into our legal vocabulary by the codifiers; prior to their existence it had scarcely any existence at all. The Ohio code is not quite as comprehensive as the New York code. The counter-claim must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, or connected with the subject of the action.

This term *counter-claim* is defined, or an effort is made to define it, by Crippen, J., in Silliman *v.* Eddy, 8 Pr. 122: "It may be, and no doubt is, many times difficult to determine whether the matter set up in an answer is a counter-claim or not.

"The word 'counter' is defined to be 'contrary to,' 'contrary way,' 'opposition to,' etc. The word 'claim' is defined to mean 'the demand of anything that is in the possession of another,' 'to demand,' 'to require,' etc.

"The compound 'counter-claim,' as used in the code, must be regarded, and in my judgment construed, to mean an opposition claim, or demand of something due; a demand of something which of right belongs to the defendant in opposition to the right of the plaintiff. It has been found difficult to apply the term 'counter-claim' to the various actions which are daily arising in our courts; and I very much doubt whether a more perplexing, undefinable, impracticable combination of words could have been joined together in the English language, than those selected in this particular by the modern reformers, who claim to stand as sponsors to the present code.

"It will be seen that in this very section the legislature are made to require of the lawyers, by a positive enactment, as a matter of law, 'that ordinary and concise language, without repetition,' shall be employed in a reply to an answer containing a counter-claim, when in the same section a compound is used so extraordinary and uncommon as not to be found in any dictionary extant. It has been said that 'consistency is a jewel.' It is not, however, to be found in the Code of Procedure."

Barculo, J., in Roscoe, Ex'r, *v.* Mason, 7 Pr. 121, says of this term: "It is unnecessary to attempt to define the precise meaning of this unfortunate compound, which has been pressed by our modern

Solons into the service of the *fourth*, and it is to be hoped the last edition of the code. It requires, however, but little knowledge of the past to foresee that this superfluous interpolation, which is not found in our best dictionaries, and has been hitherto unknown to our statutes, will furnish a new source of litigation, and contribute its share toward unsettling what remains of good pleading."

Such is the character of the word employed—a word undefined either at law or in equity, or in the English language—a term coined by some one, for some purpose not yet known, and employed in a sense not yet ascertained. There are, however, two conditions attached to the introduction of this counter-claim, whatever it may mean—*it must be matter in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action.*

1. As to the parties. It must be between a plaintiff and a defendant. If there is but one plaintiff and one defendant there is no difficulty in expounding the words. But it is *a* plaintiff and *a* defendant, seeming to single out *one* plaintiff or *one* defendant from others associated with him. Where the claim is in favor of *all* the defendants against *all* the plaintiffs, there is no difficulty in applying the law to it, and affording the appropriate remedy.

But suppose one of several defendants has a claim against all or a part of the plaintiffs, can he set it up? We are inclined to think only to a very limited extent. The case on the part of the plaintiff must, however, be such that a several judgment could be rendered between the parties in the action. A defendant can not set up a counter-claim against a part of the plaintiffs, unless the claim declared on is such a one that that plaintiff can recover in his favor a separate judgment against that defendant; then that defendant may meet that several claim of that plaintiff against him by a claim which he (the defendant) has against that plaintiff. So where all the plaintiffs are entitled to a several judgment against any single defendant, that defendant may meet that claim by any counter-claim due from the plaintiffs to him alone. So if all the defendants have a joint claim against one of several plaintiffs, they can set it up only in case the action is such that a single plaintiff would be entitled to recover a judgment in his favor against all of said defendants. The claims, therefore, to be the subject of a claim and counter-claim, must be mutual claims and between the same parties. The claim of A and B against C can not be met by a counter-claim of C against B, because the action is not such that B can recover any several judgment against C. So where several sue on a joint claim, any claim which can be the subject of a counter-claim in

behalf of a defendant, must be a joint claim against all the plaintiffs. Unless such is the meaning of the code, then you must enable *one* defendant to compel *all* the plaintiffs to pay a debt due to him from one of them; or you must go further and adjust the rights between the plaintiffs, and ascertain if anything is due to this particular plaintiff out of this money when recovered. This, in partnership cases, would involve the settling up of the partnership accounts, before it could be known whether the partner owing the defendant a several debt had any several property wherewith to pay his several debt to the defendant. If such be the meaning of the code, partners had best consider well before bringing a suit, lest they find themselves stopped in their business, and broken up by some petty claim set up by a creditor of the firm against one of its members.

Such, of course, can not be the meaning of the code. The counter-claim must, in nearly all cases, therefore, exist mutually between the parties to the suit, unless there is some claim in the action on which a several judgment can be rendered between the parties to the counter-claim. This provision was introduced as an uncertainty, to meet the uncertainty of who may be parties, and what may be the subject matters of an action. There may be such a case, but we very much doubt it.

2. The claim set up must have arisen out of the contract or transaction set forth in the petition, as the foundation of the plaintiff's claim, or be connected with the subject of the action. This is the same language as is used in pointing out what legal and equitable claims may be joined in the same action, and we would refer the reader to what is there said. It is clear that wherever, if the cause of action had existed in favor of the plaintiff, he could have joined it in his complaint, the defendant can set it up in his answer, if the right of action is in his favor. Without undertaking to define this language with more care, we may illustrate its meaning by examples coming clearly within its scope.

And first: As to actions founded on legal rights. Where a party sues for work and labor, the defendant may show that the work is of an inferior quality, when it was to have been of the best. So where a suit is brought to recover the value and price of a horse, the defendant may set up a warranty and a breach of it, or a fraudulent sale, and claim damages for that. So on a sale of a steamboat with warranty, there arises double right between the parties —to the vendor a right to the purchase money, and to the vendee for damages on a breach of warranty; and if either party sues, the

other can set up his claim by way of counter-claim. If a suit is brought on the warranty, the vendor may set up, by way of counter-claim, that the plaintiff is indebted to him for the purchase money; and in this way no judgment will be rendered, but in favor of him for whom a final balance is found due. So also to an action to recover the price and value of real estate sold, any facts, showing that the defendant ought not to be required to pay the full price, may be interposed by way of a counter-claim or recoupment.

There is another class of cases to which the same reasoning will apply, and where the counter-claim becomes a veritable suit of itself. It embraces all those cases where, heretofore, in chancery, the defendant, wanting some affirmative action in his favor was compelled to file a cross-bill. Now, he probably may set it up by way of counter-claim. Thus in an action founded on a legal title to recover the possession of land, the defendant may now set up an equitable right to a conveyance from the plaintiff; and if he prove himself equitably the owner with right of possession, and entitled to the conveyance from the plaintiff, he will not only defeat the action, but may obtain his affirmative relief. Van Santvoord's Pl. 307. In such a case the answer is a veritable cross-bill, and must state all that would have been necessary to be stated in such a bill, and must ask judgment for the relief the defendant insists he is entitled to, upon all the facts in issue between the parties. Whatever facts which would have entitled a defendant to have resorted to chancery, to enjoin the collection of the whole or a portion of the claim at law, or would have justified a defendant in equity in filing a cross-bill, will probably now lay the ground for a counter-claim. The same object will be reached by a legal paper called an answer, instead of by another heretofore called a bill in chancery. Whatever, however, the thing may be called, the remedy and the relief must be substantially the same. The answer will become the bill, and the reply the answer, and on that answer and reply will just the same relief be granted as formerly would have been upon the bill and answer: so that the whole change results in little more than a change of names.

These illustrations serve to show what is probably meant by the strange word, "*counter-claim*," and what sorts of defenses may be made under it. The New York code gives a much wider latitude, where the counter-claim originates in a contract; but our code admits set-off by name, while under the parent code it comes in under this word "counter-claim."

Since the above views were written, we have obtained the tenth volume of the Practice Reports of New York, in which there are cases in which this question of counter-claim is more fully discussed than in any previous case; and as these views are somewhat different from those expressed above, we feel bound to refer to them.

Before doing this, however, we may as well refer to one other matter, which presents a veritable difficulty in one class of cases; and it is this: What is to be done with a case where the action is one founded on legal principles, and in which the parties are entitled to a trial by jury, when the counter-claim set up is in equity, which, admitting the plaintiff's right to recover at law, seeks to prevent him from enforcing that right by a prayer for affirmative relief? We may refer to what we have already said on this subject. There is here such a difficulty as would seem to preclude such a matter from being set up as a counter-claim in an answer, unless the court can treat this answer as a new action, to be tried as though presented as original matter, and in a petition. Under the former practice in chancery, where such a case was raised by bill in that forum, the complainant was compelled to consent to a judgment in the action at law, because he admitted the right; and then the injunction restrained only the issue of the writ of possession. Upon the principles, then, as administered in a court of equity, a party in such a case had no defense to such an action; as a condition to relief he had to consent that that action should be decided against him. Can he have any more or other right under the code? It would seem not. In equity and by the law of equity he has no right to stop the plaintiff at law; his right to set up his equity depends upon his consenting to a judgment at law; if he refused to do this, then he could have no injunction in equity against the suit at law. Ham *v.* Schuyler, 2 Johns. Ch. 140. If, then, the law of equitable relief is to be administered, this defense must now be sought as formerly, by an original petition; that petition may be treated as a cross-petition, so that no new service need be made—as a cross-bill was treated in equity; though in that case a subpena and service was required in the cross-suit. This difficulty may be escaped from under the provisions of section 119. That section allows a counter-claim to be turned into a separate action; this, however, depends upon the volition of the party pleading it. How this difficulty is to be avoided we know not, except by holding that such matter can not be set up as a counter-claim, since the right to interfere with the action at law depends upon putting an end to

it. The right is not a right to stay the action, but to prevent its execution by a writ of possession. But without dwelling longer on this matter, we will proceed to the cases referred to above.

The first is the case of Kneedler *v.* Sternbergh, 10 Pr. 67, decided by Hand, J., in June, 1854. "The meaning of the word 'counter-claim,'" says the judge, "has already been a subject of some discussion. Whittaker Pr. 506, 507. Not being a technical word, nor found in our dictionaries, its definition, as usual in the code, is not perfectly clear. It does not, however, owe its paternity to the code. Although seldom used, it has been, occasionally, by the profession. Williams and Patterson, JJ., in Mee *v.* Tomlinson, 4 Ad. & El. 262; Wilde, C. J., in Collander *v.* Howard, 10 Com. B. 262; Sedg. on Dam. Ch. 17. Like some other rather inelegant compounds—as, 'counter-demand' (6 Ves. 141), 'counter-letter' (11 Peters, 351), 'counter-paper,' and 'counter-security' (Chitty on Bills, 711), 'counter-action' (5 Exch. 356),—it may sometimes be met with in our law books; but most generally, before the code, I believe it had reference to a *set-off*. The word 'claim' has been considered 'a word of art,' and long since was defined by C. J. Dyer to be 'a challenge by a man of the property or ownership of a thing which he has not in possession, but is wrongfully detained from him.' Plowden, 359. And its popular signification and use would hardly include *recoupment* in every case. Recoupment is not always a subsisting claim. Suppose a disseizor erects permanent improvements; when called upon to respond in damages he may *recoupe* what he has so expended. Coulter's case, 5 Coke, 131; 8 Vin. 556; Sedg. on Dam. Ch. 17. And yet he has no cause of action therefor. Its early use was in this sense; but I do not understand this would be a counter-claim within the code. Indeed, the examples of recoupment given in Viner are under the head of discount. A counter-claim must be a cause of action, a cross-demand. Sec. 94 Ohio, and sec. 150 New York code. The defendant can have no *claim*, properly speaking, arising solely out of the plaintiff's cause of action. Where the defense rests in the mere right of deduction, or diminution of the plaintiff's damages, the law, before the code, gave and enforced that right. The claim of the plaintiff may now be met by independent causes of action arising upon the same or other contract; but this is quite another thing. In this case, if the original contract of purchase had been between these parties, and the defendant had set up a warranty by the plaintiff, and damages claimed by breach thereof should be allowed, that would have been a counter-claim. But when a vendee,

who has paid nothing in an action for the purchase money, seeks merely to reduce the amount of the recovery by showing a partial failure of consideration, or even defeat a recovery by showing a total failure, it is not easy to see how such a defense can be deemed to be a cause of action on his part. Besides, as to a partial failure, with all respect for those who may think differently, I find no rule in the code, by which either a partial defense or matter in mitigation can be pleaded alone any more than formerly, especially where the action or defense does not belong to equitable jurisdiction.

"But the same reason for requiring the defendant in his plea to meet the whole of the declaration or count, by a denial or other matter in avoidance, or by opposing claims, or by confession, or by some or all of these defenses combined, still exists. The code only abolishes the *forms* of pleading, not principles. It seems to me that the rule, that such matters may be given in evidence, still prevails."

This is all very well where the defendant is not bound to make oath to his answer; but where he must swear to it, he must state the truth, and that truth must admit a part to be due, and a failure as to the balance. He can not deny under oath the whole debt; and hence, unless he can admit a part and set up the failure or want of consideration to the residue, he must pay the whole claim. What Judge Hand here says is probably true; but are men to be swindled by the absurdities of the code? It is better to enlarge or restrain its language as justice may require. Indeed, unless that is done, the sooner it is repealed the better. The code itself requires courts thus to deal with it, as may be seen by looking at section 2. It is to be liberally construed to assist parties in obtaining justice.

The other case referred to is that of Drake *v.* Cockroft, 10 Pr. 377. The action was brought to recover rent due upon a lease. The defendant set up by way of counterclaim that the landlord, or plaintiff, in the absence of the defendant, broke open the stable and willfully took and removed the personal property of the defendant therefrom, and that the same was injured, destroyed, or lost to the plaintiff.

It is not claimed, says Woodruff, J., in delivering the opinion of the court, that such a trespass could be set up, before the adoption of our code, as a defense to an action by the landlord for the rent. After reciting the provisions of the code, he proceeds: "A trespass upon real or personal property is not a cause of action arising on a contract. The second clause, then (providing for cases arising on

contract), clearly does not authorize such a defense in an action upon a contract, and the present is an action upon the contract of hiring.

"Does the first definition or explanation of the term counter-claim embrace the matter set up in this answer?

"Obviously it does not, unless the cause of action set up in the answer arises out of the contract set forth in the plaintiff's complaint, or is connected with the subject of the plaintiff's action.

"The answer sets up a trespass by the landlord upon the demised premises, and the destruction of the defendant's goods. It does not even claim damages for the *entry*, or for any injury to the *possession*, but only to the personal property destroyed. The contract set forth by the plaintiff is a letting and hiring, and an agreement by the defendant to pay rent.

"The trespass averred *does not arise out of any contract.* The liability of the plaintiff for the trespass does not result from that contract, nor is it affected by it.

"As a *cause of action* it is wholly independent of that contract; and the liability therefore exists to the same extent, and is neither less nor greater than if the trespass had been committed upon any other premises in the occupation of the defendant. The landlord is no more liable for the trespass than for the like trespass committed elsewhere.

"Nor is the trespass *connected with the subject* of the action. The subject of the action is *rent*, or money due upon the contract of hiring—the *compensation* for the use and occupation of the land. The use and occupation have not been interfered with. They have continued without interruption. An interference with the possession, an eviction, total or partial, an unlawful injury to the premises, in violation of the agreement of letting, would have given the defendant a claim for damages which, upon a liberal construction of the language of the code, might have been connected with the subject of the action so as to constitute a counterclaim. But a mere trespass is no more connected with the subject of an action brought for the rent, than an assault and battery of the tenant by the landlord would be.

"I can find no more ground for saying that such a trespass can be set up as a defense to an action for rent now, than before the code was enacted. The provisions of the code above referred to were designed to affirm the right of a defendant to recover damages in those cases in which a recoupment was proper before the code was enacted. See Reab *v.* McAllister, 8 Wend. 109; Batter-

man *v.* Pierce, 3 Hill, 191. If the code extends the right to any other cases not within the law of set-off (which I doubt), they are not such as are exhibited by the answer now in question."

Here are two judges widely disagreeing as to the effect of this provision of the code—Judge Hand thinking that certain cases of recoupment, as that word is rightly defined, do not come within this counter-claim; while Judge Woodruff thinks it meets cases of recoupment and no other. So much for the perspicuity of the learned codifiers, who require everybody else to use *ordinary* and *concise* language, without repetition! They have manifestly failed in the end of all language—that of making themselves understood.

Mr. Justice Woodruff seems to imply that if the landlord had disturbed the tenant's possession, then he might have set it up as a counter-claim. This can not be correct. It could be done only on the ground of its being connected with the subject of the action. The subject of the action is the *rent;* and on that two questions arise—*First.* Is any rent due? *Secondly.* How much? Now no act of the landlord on the premises can be connected with the subject of this action—the rent—unless it is such as to defeat the right to recover the rent, in part or whole. But a trespass does not do that, nor is a trespass connected with the subject of rent. It is a wholly independent matter. They are no more connected than two separate assaults would be, simply because they happened on the same inclosure. The rent is due for the use of the land; the trespass is an injury to the right of the tenant in the land; but how the one can be said to be connected with the subject of the other, is more than we can understand. Blair *v.* Claxton, 18 N. Y. 529; Edgerton *v.* Page, 20 N. Y. 281; 12 Ohio St. 344, 622; 3 Ib. 333; 4 Ib. 680; 5 Ib. 520; 6 Ib. 207; 7 Ib. 85; 10 Ib. 327.

Since the first publication of this work, numerous decisions have been made in regard to the subject of counter-claim, which deserve citation and consideration. This provision as to counter-claims has sometimes been referred to the prior practice of *recoupment*, a word coming from a French verb, which signifies to chip off, to cut off, and also a set-off. It is the right which a party has to cut down a claim sued for, by showing that the goods which were the basis of it, were defective and not what they were warranted or represented to be in quality or value. "When a party," say the court in Upton *v.* Julian, 7 Ohio St. 95, 97, "sues to recover for goods sold and delivered, or work and labor performed under a contract, it would seem reasonable that he may be required, upon proper notice, to account in the same action for his own disregard

of the obligation of the same contract. Why should he be allowed to recover, as upon a full performance on his part, and the defendant be driven to a cross-action, the result of which would leave the parties just where the principle of recoupment would have placed them at the close of the former suit?

"And the principle is the same, whether the suit be brought upon the original contract, or, as in this case, upon a promissory note founded thereon.

"Our present code fully sanctions this right and provides for its exercise by way of counter-claim." *Vide* also Steamboat Wellsville *v.* Geisse, 3 Ohio St. 333. Such a proceeding is in the nature of a cross-action, and is governed by the same principles. Timmons *v.* Dunn, 4 Ohio St. 680; Nichols *v.* Dusenbury, 2 Comstock, 286.

In Hill *v.* Butler, 6 Ohio St. 207, 216, Swan, J., says: "The code allows any ground of defense existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, or connected with the subject of the action, to be set up as a counter-claim. Code, sec. 94. This provision allows the defendant to plead various matters of defense, which could not be entertained before the adoption of the code, either on account of the separation of the law and equity jurisdictions of courts, or the forms of actions and pleadings.

"But it neither changes contracts, nor alters the rights of the parties; it only changes and enlarges the mode by which contracts shall be enforced and existing rights vindicated. Hence, in the case before us, the rights of Hill under the covenants in the deed of Butler, and under the alleged agreement as to a defect in the title, must be determined upon the recognized principles of courts of law and equity, and can obtain no support by means of this provision of the code. In other words, the counter-claim must contain facts recognized by courts of law or equity as constituting an existing cause of action." So in that case, it was decided that where land had been sold and conveyed with warranty, and vendee was in possession, no right of counter-claim existed as against an action to recover the purchase money, because the warranty was not broken till an eviction of the vendee under a superior title. The counter-claim must set up facts, which would sustain an action in his favor against the plaintiff. The code does not change the liabilities of parties; it only provides a remedy in a single action for the adjudication of both actions, since they grow out of the

same transaction. The claim must also exist between a defendant and a plaintiff in the action; hence that a counter-claim can not be allowed to one of several defendants against the plaintiff, when it appears that another defendant is primarily liable for the claim demanded. Ernst *v.* Runkle et al., 5 Ohio St. 520. It was also held in this case, which was to recover an assessment to improve a street, that a claim for damages sustained in making the improvement, could not be set up as a counter-claim, unless the claim had been presented to the clerk of the city and sixty days thereafter had elapsed, because until that had been done and the sixty days had passed, there was no right of action against the city, and a counter-claim must be an existing right of action.

So in the case of Gillespie *v.* Torrance, 25 N. Y. 306, it was held that the accommodation indorser of a note given for chattels sold in an action against him alone, could not, at law, avail himself of a breach of warranty as to the quality of such chattels by way of defense, recoupment, or counter-claim. Selden, J., says: "Under the code of procedure, doubtless a balance might be recovered (Code, secs. 150–274; Ogden *v.* Coddington, 2 E. D. Smith, 317); but the right of election to set up a counter-claim in defense, or to bring a cross-action for it still exists. Halsey *v.* Carter, 6 Duer, 667; Welch *v.* Hazleton, 14 How. Pr. 97. Now, it is not easy to reconcile with these established principles the right of the defendant in this suit to avail himself of the claim which Van Pelt may have against the plaintiff, on a breach of warranty: 1. Such damages constitute a counter-claim, and not a mere failure of consideration, and not being due to the defendant, can not be claimed by him. Code, sec. 150; Lemon *v.* Trull, 13 Pr. 248; 16 Ib. 576, note. 2 Van Pelt has a right of election whether the damages shall be claimed by way of recoupment, in the suit on the note, or reserved or a cross-action. The defendant can not make this election for him. 3. If the defendant has a right to set up the counter-claim, and have it allowed in this action, it must bar any future action by Van Pelt for the breach of the warranty; and as no balance could be found in defendant's favor, he might thus bar a large claim in canceling a small one. If the right exists in this case, it would equally exist if the note was but $100, instead of $1,800. 4. Supposing the other given for the timber to have been indorsed by different persons, for the accommodation of Van Pelt, and all to remain unpaid, each of the indorsers would have the same rights as the defendant. If they were to set up the same defense, how would the conflicting claims be reconciled?

"In the case, which was shown on the trial, there would seem to be a strong equity in favor of the defendant to have the note canceled or reduced, by applying toward its satisfaction the damages which appear to be due Van Pelt for the breach of warranty. It is, however, an equity, in which Van Pelt is interested to as great, and possibly to a greater extent than the defendant, and can not be disposed of without having him before the court, so that his rights as well as those of the defendant, may be protected. That remedy may be open to the defendant still, notwithstanding the judgment, especially if the insolvency of the parties renders that course necessary for his protection. 14 Johns. 63; 17 Ib. 389; 2 Cowen, 261; 2 Paige, 581; 6 Dana, 32; 8 Ib. 164; 2 Story's Eq., secs. 1440*a*, 1437. My conclusion is that the court below was right in holding that the defendant could not set up the breach of warranty in defense, partial or total, to the suit on the note."

In the case of Walker, Adm'r, *v.* John A. Millard, 29 N. Y. 375, the question came up in another form. The testator made an agreement with the defendant, by which the plaintiff was to furnish materials and do certain work for defendant, for which he agreed to pay $600. The intestate proceeded in the work, was paid $100, and when the work was nearly done, the defendant gave a note for $400, still leaving $100 due. The action was on the note and for the $100. The intestate did not complete the work; the defendant set up a counter-claim for not completing the work. The court held that the paying $100, and giving note for $400, was a change of the terms of payment, and that a failure to complete the work was no defense to, nor could it be set up as, a counter-claim against the amount due on the note, but only against the $100 still due on the original agreement. Johnson, J., delivered the opinion of the court. "There being no fraud," he says, "or mistake of facts, the party giving the note is precluded from setting up the contract to defeat a recovery upon it. This was held in Thorp *v.* White, 13 Johns. 53, a case quite analogous to this. See also 1 Parsons on Notes and Bills, 197, 200. This must be so on principle. The note certainly was founded upon a good consideration. It was not given in pursuance of the contract, but upon a new agreement, which was a waiver of the terms of payment prescribed in the contract. A subsequent breach of the contract by the payee could not affect the note, which was given for work already performed. Such a breach could, by no possibility, be construed into a failure of the consideration of the note. . . . . It was, however, a good defense to the action upon the

contract, to recover the balance remaining unpaid, and so the referee held." This was an effort to avoid pay for what work was done, on the ground that by the contract the completion of the work was a condition precedent to recover at all. The plaintiff failed to recover the $100 on the contract, and then the defendant claimed to set up his damages on the contract against the note as a counter-claim, though his damages were less than the $100 due on a completion of the agreement. This the court held he could not do. So also in the case of Loomis et al. *v.* Eagle Bank, 10 Ohio St. 327. In this case, E. Gilbert & Co. had agreed, on May 1, 1855, to deliver one thousand kegs of powder, one-half to be delivered at once, the other half in June following. The one-half was delivered as agreed, and the note given therefor; the other half never was delivered. It was averred the bank had knowledge of this failure to deliver the balance; to damage of defendants, $850. The court held that there were two contracts, and that a failure to deliver the last lot could not be set up as a counter-claim against the amount due on the note given for the non-delivery of the second lot. This was on the ground that the damages sustained by a failure to deliver the second lot did not grow out of the same transaction as the first note did. On the delivery of the first lot of powder, the note was given for the value of that lot, and that closed up the first agreement; a failure to deliver the second lot in June was a liability resting on Gilbert & Co. personally, as in law a separate transaction. The parties so understood it, or the first note would not have been given in completion of that part of the agreement. This case, then, decides that where an agreement is made for the delivery of certain merchandise in several lots, at different times, and as each lot is delivered, that part is closed by a bill or note, any damages sustained by a failure to deliver any subsequent lots or parcels can not be set up as a counter-claim against the notes already given: and this is a proper construction on the agreement and the application of the law. Each lot or parcel is a transaction completed by the giving of the note. So expenses incurred by an assignee of an insolvent are not matters of counter-claim, to be set up in an action by a creditor calling him to account; it is matter to be allowed or not in settling his account of assignee. If such a matter is set up in an answer, it is not new matter requiring a reply. Duffy *v.* Duncan, 35 N. Y. 187. In the case of Lawrence *v.* Bank of Republic, 35 N. Y. 320, the defendants set up as a counter-claim to an action by assignees of Lane, Boice &

Co., to recover money deposited by them with defendants, and belonging to them as such assignees, a claim which it had against the assignor, Lane, Boice & Co. But the court held that it could not be done. They received the money from plaintiff as trustees for the benefit of all the creditors, and the bank could not obtain a priority over other creditors by setting up what was called a counter-claim; they had no other remedy than other creditors—a creditor's bill for the distribution of the fund. This counter-claim did not grow out of the same transaction as the plaintiffs' cause of action. That was a deposit of money by plaintiffs with the defendant; the counter-claim grew out of dealings between defendant and Lane, Boice & Co. "It is said," say the court, "that such a defense is authorized by the code to prevent circuity of action. However desirable it may be to settle in one suit all the controversies between the parties, which relate to the same subject matter, it is not proper to disregard the well-settled forms of action to accomplish such result, except where the statute plainly furnishes a new form of remedy. It is safer to abide by the old landmarks of the law than to try experiments in the expectation of finding a shorter road to the temple of justice." This answer was an effort to avoid paying this money, as they had agreed, by starting a creditor's bill against the plaintiffs (the assignees) by way of an answer. The court held rightly, that they must pay the money to the assignees from whom they received, and, if they saw fit, proceed by a new action, in form of a creditor's bill, for the distribution of these funds. The assignees were responsible for the safe-keeping of the money, and not the bank. They were also trustees of an express trust, and, as such, had a right to sue for its funds. There may be cases when the facts stated may constitute a defense to the action, or a counter-claim, which may be set up to recover damages to meet plaintiffs' claim, and the court will give such an effect to the answer as will best promote the ends of justice. Lancaster (O.) Man. Co. *v.* Colegate, 12 Ohio St. 344. A counter-claim exceeding in amount a justice's jurisdiction, can not be set up in an action before a justice. Ib.

In an action for rent, the defendant may, under a covenant of the landlord to keep the premises in repair, set up, as a counter-claim, an amount expended by him in the necessary repair of the premises, and also damages sustained by the loss of the use of certain parts of the premises, rendered untenable for the want of repair. Myers *v.* Burns, 35 N. Y. 269. So where a real action is brought to turn the tenant out for non-payment of rent, the tenant may show, by way of counter-claim, and to reduce the amount of

the rent due, that he has been evicted from a portion of the leased premises. Blair *v.* Claxton, 18 N. Y. 529. The court say: "It was mainly for the purpose of avoiding the necessity of resorting to several actions in cases of this kind, that the distinction between legal and equitable remedies was abolished; and it was in furtherance of that policy that a counter-claim was allowed to be interposed where the defendant had 'cause of action, arising out of the contract or transaction, set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action.' Code, sec. 150. In ejectment for non-payment of rent, it is essential to ascertain whether any and how much rent is due; and, in coming at this, the defendant ought to have the advantage of any equitable answer he may have to the claim for rent: and the present forms of procedure are adapted for the adjustment of such a claim, upon equitable as well as legal principles." This case can hardly arise in Ohio, as we have no such statutory remedy for rent unpaid. If a lease were drawn that a failure to pay rent should forfeit the lease, the lessor might bring a real action, and, under the issue that he does not unlawfully detain, the defendant might show that there was no rent due, and hence that plaintiff was not entitled to recover. The issue of "do not unlawfully detain" is as broad in one respect as the old plea of not guilty in ejectment. It raises the issue whether defendant *unlawfully* keeps the plaintiff out of the possession of land to which he has the title.

These questions came up also in the case of Edgerton *v.* Page, 20 N. Y. 281. It was there held that, when the amount of the rent is fixed by the lease, and the lessor is guilty of wrongful acts, which are not done under a claim of right, but are acts of mere trespass or negligence, the injury could not form the subject of a counter-claim in an action for the rent. Grover, J., delivered the opinion of the court. "The demurrer," he says, "presents two questions: First, whether the facts alleged in the answer constitute a defense; second, whether they constitute a counter-claim, available to the defendant by way of a recoupment or otherwise in this action. The rule has long been settled that a wrongful eviction of the tenant by the landlord, from the whole or any part of the demised premises, before the rent becomes due, precludes a recovery thereof until the possession is restored. Christopher *v.* Austin, 1 Kern. 217. Whether this eviction must be actual by the forcible removal of the tenant by the landlord from the demised premises, or a portion thereof, was not settled in this State until the case of Dyett *v.* Pendleton, 8 Cowen, 728. In that case the principle was

established by the court for the correction of errors, that when the lessor created a nuisance in the vicinity of the demised premises, or was guilty of acts that precluded the tenant from a beneficial enjoyment of the premises, in consequence of which the tenant abandoned the possession before the rent became due, the lessor's action for the recovery of the rent was barred, although the lessor had not forcibly turned the tenant out of possession. . . . Such act of the lessor, accompanied by an abandonment of possession by the lessee, is deemed a virtual expulsion of the tenant, and, equally with an actual expulsion, bars the recovery of rent. The reason of the rule is, that the tenant has been deprived of the enjoyment of the demised premises by the wrongful act of the landlord; and thus the consideration of his agreement to pay rent has failed. In case of eviction from a portion of the premises, the law will not apportion the rent in favor of the wrong-doer.

"The remaining question is, whether a counter-claim, arising from facts contained in the answer, is available to the defendant in this action. By section 149 of the code, the defendant is permitted to include in his answer new matter constituting a counter-claim. A counter-claim must be, first, a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action; or, second, in an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action. The demand of the defendant, set out in the answer, does not arise out of the contract set forth in the complaint. That contract is for the payment of rent upon a lease of the demised premises. The defendant's demands arise from the wrongful acts of the plaintiff in permitting water to leak and run into the premises, and in causing or permitting it to be thrown upon the premises and property of the defendant. These acts are entirely independent of the contract of leasing, upon which the action is brought. The demands are not connected with the subject of the action—that is, the rent agreed to be paid for the use of the premises. The defendant's demands are for a series of injuries to his property, deposited upon the premises, and for impairing the value of the possession. It would be a very liberal construction to hold that, in an action for rent, injuries from trespasses committed by the lessor upon the demised premises might be interposed as a counter-claim. The acts of the plaintiff in this case are of a similar nature. They are either acts of trespass or negligence, from which the injuries of the defendant accrued. Such a construction

could only be supported by the idea that the subject of the action was the value of the use of the premises. But when there is an agreement as to the amount of the rent, that value is immaterial. Unless the acts of the plaintiff amount to a breach of the contract of leasing, they are not connected with the subject of the action. In the case of Mayor of New York *v.* Mabie, 3 Kern. 151, it was held by this court that a covenant for quiet enjoyment by the lessor was implied in a lease under seal for a term not exceeding three years, since as well as before the revised statutes; that this covenant was broken by any interference with the possession by the lessor, under a claim of right; consequently, that damages sustained from such acts might be recovered in an action for rent. It was remarked by Denio, J., in giving the opinion in that case, that it is not, however, every new trespass by the lessor upon the demised premises which will amount to a breach of this covenant. There is nothing in the answer in this case tending to show that any of the acts of the plaintiff were done under any claim of right whatever. They did not, therefore, amount to a breach of the contract created by the lease, and the injuries sustained by the defendant do not therefore constitute a counter-claim connected with the subject of the action."

In the case of Starbird *v.* Barrows, 43 N. Y. 200, this provision came up for consideration in another form. In that case the plaintiff had agreed to transport by canal a cargo to be delivered by the defendants, from Rochester to New York. The boat was frozen in the canal and delayed, and defendants put to great expense in preserving the cargo, but the same was yet injured. In an action to recover for injuries done the boat by defendants while so in possession to take care of the cargo, the court held that damages occasioned by improper delay of the plaintiffs in transporting the cargo was the proper subject of a counter-claim. In Allen *v.* Shackelton, 15 Ohio St. 145, it was ruled that to a petition on a mortgage given to secure the purchase money on a sale by mortgagee to mortgagor of the premises, covered by the mortgage, the mortgagor and defendant could set up a counter-claim for damages against the vendor and plaintiff for fraud practiced by the vendor in the sale of the mortgage premises. The court say: "By section 93 of the code of civil procedure, it is provided that the defendant may set forth in his answer as many grounds of defense, counter-claim, and set-off as he may have, whether they be such as have been heretofore denominated legal or equitable, or both; and in the following section it is provided, by way of limitation or re-

striction, that the counter-claim mentioned in the last section must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, or connected with the subject of the action.

"It seems to us that in this case, the allegations in the answer, and proofs offered in their support, come within the express terms and also within the spirit of these provisions of the code. The leading object of the statute was to provide, where the parties were so before the court as that it could well be done, that the rights and claims of the defendant, growing out of a transaction, should be heard and settled in the same suit, in which the plaintiff asserted his claims, arising from the same transaction, thus avoiding multiplicity of suits, and at the same time securing better justice between the parties." A somewhat similar question came up in the case of Morgan *v.* Spangler, 20 Ohio St. 38. This was an action of replevin brought to recover a certain quantity of railroad iron; the plaintiffs were mortgagees of the iron; the defendants set up a lien on the iron made by levy and attachment; and the court held that a counter-claim might be set up by the creditors having lien by attachment or levy on the iron. I do not understand this case; the mortgagee had the legal title to the iron till his debt was paid, and no one could take the iron out of his hands; if they did, he had the right by replevin to repossess himself of the possession. There was here no question of money; it was a mere question of possession, and the right of possession. As against the mortgagor, if he had possession, he could not keep that possession as against his mortgagee; nor could he set up a counter-claim for what might be coming to him out of the property after paying the mortgage debt. These execution and attachment creditors had no other or greater rights than the mortgagor had, and if he could not set up a counter-claim, no more could his creditors by execution. The execution creditors had a right, not to defeat his action of replevin, but to file a bill to compel the sale of the mortgaged goods, and the proceeds to be distributed among the creditors according to their respective priorities. What these creditors in fact were allowed to do was to convert, unnecessarily, an action of replevin into a bill in chancery to redeem the mortgaged goods, and so enforce a sale and secure to them, after paying the mortgaged debts, what might be left. A counter-claim has nothing to do in a case founded in equity; equity jurisdiction dealt with all such questions

without the aid of the code; counter-claim was introduced to provide a remedy for cross-claims in a legal action. There is no such thing as a counter-claim in a case founded on principles of equity; equity dealt with all such questions as a part of equity jurisdiction; but nowhere does the code justify setting up matter of equitable jurisdiction to an action at law, unless it grows out of the same matter the plaintiff's action does. In this case, the mortgage was the agreement, and the possession of the mortgaged property was the subject of the action. The attachment liens did not grow out of the mortgage, nor out of the right to the possession. The mortgagee was entitled to possession against the mortgagor and all those claiming under him, as these creditors did. It was useless, then, to admit a practice which was supported, not by the code, but by some decisions of the court. There is no authority in the code to convert an action at law into a bill in chancery by way of defense, counter-claim, or set-off. The action, if for money only, must be tried by a jury; there is no ground for the doctrine that a part of a case may be tried by a jury and a part by the court. The code lends no countenance to such an absurdity, but declares that the character of the plaintiff's action shall settle how service shall be made, how the case shall be tried, and whether the plaintiff is entitled to a judgment for costs. This confusion is necessarily introduced by holding that what is matter for a bill in equity may be set up as an answer to an action at law. This distinction must be kept in mind: that a counter-claim can only be properly plead in an action at law; that courts of equity always dealt with such matters in a suit in equity; whatever facts would constitute a counter-claim in an action at law, the same facts, connected with a claim set up in equity, could always by answer be introduced into the case so that complete justice might be done. In this case, there was no defense to the suit of replevin; on the facts admitted the plaintiff was entitled to possession; and the rights of the execution and attachment creditors of the mortgagors had a distinct and clear remedy, a petition in equity to redeem; and hence there was no necessity to introduce such a mongrel character into an action in replevin under the name—a false one—of a counter-claim. In the prior case of a mortgage of land, it was wrong to call the fraud in the sale a counter-claim; it was matter in equity for an answer, before the code and since the code. When a party went into equity he had to do equity; if he committed a fraud in the sale of land on which he took a mortgage for balance of purchase money, and went into equity to foreclose that mortgage, the vendee

could always set up the fraud to cut down the amount of the mortgage; there was no counter-claim; it was simply an answer; and it is the same thing under the code in a case founded on principles of equity. There is, then, no counter-claim in a suit in equity; it is simply a matter for answer: besides, a counter-claim is a case in which a money demand is set up, so that the judgment may be for money in favor of the party for whom the largest verdict is returned. If you want something besides money, you must file an original petition in equity, praying for the relief you want, and meantime obtaining, as the law authorizes, an injunction restraining proceedings in the action at law. Equitable and legal matters can not both be compressed into the same action, save when they grow out of the same transaction; and even then no one knows how the case is to be tried, since the code nowhere provides for the proceedings in and trial of such a case. The action must be for the recovery of money only, or it must be a petition in equity. If the relief in equity is for money, as well as in the action at law, then there may be a joinder of the two causes, and not otherwise, since the code nowhere provides for an action of this double character. How is service to be made in such an action? The code does not provide for it. How is it to be tried, by court or jury? The whole case is to be tried by the same tribunal; there is no provision in the code for a part of a case to be tried by a court and a part by a jury. And how are the costs to be disposed of? In the one class it follows the judgment; in the other, it is at the discretion of the court. Equity and law are two separate and distinct matters of jurisdiction under the code, as before the code; and it may be well and conducive to a clear understanding of the law, if this fact was distinctly recognized and acted upon.

Crozier, C. J., in the case of Leavenson *v.* Lapstone, 3 Kan. 523, 525, says: "The section referred to does not apply after the rendition of judgments upon cross demands. It applies only in cases where the defendant sets up his cross-demand before judgment is rendered against him. When the claims on each side are adjusted, the party establishing the larger is entitled to judgment for the excess. If the action is brought by an assignee, the defendant is not deprived of the right to counter-claim or set off his demand against the assignor, and although he may not be entitled to judgment against the assignee for the excess, yet he may prevent judgment against himself if his demand equals or exceeds that against him." The court also held that if each party brought actions, and recovered judgments, on a motion to set up one against

the other, the lien for attorneys' fees, could not be avoided by the set-off.

In the case of the National Fire Ins. Co. *v.* McKay, 21 N. Y. 191, 196, Comstock, Ch. J., says: "I apprehend that a counter-claim, when established, must in some way qualify or must defeat the judgment to which the plaintiff is otherwise entitled. In a foreclosure suit, a defendant who is personally liable for the debt, or whose land is bound by the lien, may probably introduce an off-set to reduce or extinguish the claim. But where his personal liability is not in question, and where he disclaims all interest in the mortgage premises, I do not see how he can demand a judgment against the plaintiff on a note, a bond, or a covenant. The appellant has, as he insists, a cause of action against the plaintiff upon a broken covenant; but that cause of action, if it exists, does not enable him to resist or modify the relief to which the plaintiffs are entitled." If a counter-claim must exist in favor of the *defendant*, against the plaintiff (Bates *v.* Rosenkrans, 37 N. Y. 409), the right of the plaintiff to claim, and the defendant to counter-claim, must be reciprocal. Mayor, etc., of New York *v.* Parker-view Steamship Co., 12 Abb. 300; S. C., 21 How. 289. For where there is no claim on the part of the plaintiff, there can not, strictly speaking, be a counter-claim. Bellinger *v.* Craigue, 41 N. Y. 116. A counter-claim *must contain* not only the substance of what is necessary to sustain an action in favor of the defendant against the plaintiff, but it must also operate in some way to defeat in whole or part the plaintiff's right of recovery. Mattoon *v.* Baker, 24 How. 329.

A defendant may elect to set up, by way of counter-claim, a cause of action, or bring a cross-action on it. It is optional with him which course he will pursue. Peck *v.* Minot, 4 Rob. 323; Lorraine *v.* Long, 6 Cal. 452; Gillespie *v.* Torrance, 25 N. Y. 306. An action for equitable relief is not barred because the plaintiff might have interposed the claim as a defense in a former suit. Siemon *v.* Schurck, 29 N. Y. 598; Kerr *v.* Hays, 35 N. Y. 331.

The validity of a counter-claim is to be determined by the inquiry, whether or not the substance of the facts stated would constitute a cause of action on behalf of the defendant against the plaintiff, if the plaintiff had not sued the defendant. In other words, the statement of a counter-claim is a petition by the defendant against the plaintiff, and must contain facts which constitute a cause of action. If it does not, a demurrer will lie to it. Vasscar *v.* Livingston, 13 N. Y. 218; S. C., 4 Duer, 285. If the

alleged counter-claim consists of facts which are insufficient to bar a recovery or to affect the amount of his recovery, the plaintiff should have judgment, notwithstanding there is no reply filed denying the facts. Van Valen *v.* Lapham, 13 How. 240; S. C., 5 Duer, 689. Where the same facts constitute both a bar and also a counter-claim, the answer should show affirmatively in which aspect the facts are presented. Burrall *v.* De Groot, 5 Duer, 375; Bates *v.* Rosenkrans, 23 How. 98; S. C., 34 Ib. 626.

In an action on a note by an assignee, it was held that a cause of action existing only against the payee could not be set up as a counter-claim or set-off, although the plaintiff received the note from payee after its maturity. But where the facts alleged as a defense show the invalidity of the note itself in the hands of the payee, either for want or failure of consideration, such facts are admissible in favor of the maker, as against an assignee thereof, after maturity. Wiltsie *v.* Northam, 3 Bosw. 162; Cummings *v.* Morris, 25 N. Y. 625. This decision is founded on the principle decided in Chandler *v.* Drew, 6 N. H. 469, and McDuffie *v.* Dame, 11 N. H. 244, that the equity to which an assignee or indorsee after maturity is held, is an equity growing out of the note itself, and not from other claims existing in favor of the defendant against the payee, unless the assignee or indorsee had full knowledge of the existence of such set-off. A counter-claim will always be admissible, but not a set-off; the former is connected with the claim of the assignee, but the set-off is an independent and distinct cause of action, having no connection with the plaintiff's cause of action.

III. *Set-off.*

Sec. 97. A set-off can only be pleaded in an action founded on a contract and must be a cause of action arising upon a contract, or ascertained by the decision of the court.

It will thus be seen that set-off remains as it always was, with the single exception of a claim or cause of action, ascertained by the decision of the court. Judgments under prior statutes were not the subject of a set-off. If the judgment was one of the same court, a set-off, after judgment, might be made by the order of the court, on motion, by applying the one judgment against the other. This section would seem to authorize a defendant to set off a judgment which he may have in another court against the plaintiff, and thus avoid the expense of the second suit. It is true the code says, "ascertained by the decision of *the court*," which would seem

to restrict it to judgments remaining in the court where the suit is pending. This is surely too narrow a construction to give to the section, since it would render it almost nugatory. If the language had been of *a court*, then there could have been no room for controversy; nor could there have been if the word *judgment* had been used. In the effort of the law-makers to ignore well-settled legal terms, they have repeatedly left their meaning open to debate. If the judgment must be a judgment of the court where the suit is pending, then no really new remedy is afforded; substantially the same thing could have been done before; and it would be imputing absolute fatuity to the commissioners whose work this code is, to suppose that they designed to restrict it in any such manner. A judgment ought to be the subject of set-off as well as a promissory note, bond, bill, etc.; and if it ought to be allowed to be a set-off in one court, so equally ought it to be if it is remaining on record in any other court. A judgment is the highest evidence of indebtedness, and surely if a claim for goods sold ought to be applied to cancel a debt due from one to another, a judgment ought to be so applied. We hold, therefore, that the code allows judgments generally to be the subject of a set-off.

A set-off not replied to is admitted; and if it shows a sum due the defendant, after satisfying the plaintiff's claim, he is entitled to a judgment for that sum. Potter *v.* Smith, 9 Pr. 262.

So the defendant may include in a *single* statement of set-off, as many different items of set-off as he may have. "This," says the judge, in the case of Ranney *v.* Smith, 6 Pr. 420, "was admissible in a plea under the system superseded, although a declaration formed in the same way would have been bad for duplicity. The general rule was that, in point of form, the plea of set-off should, contain all the requisites essential to the validity of other pleas in law. 1 Chit. Pl. 495; Barb. on Set-off, 79. Duplicity, however, in a plea of set-off, was not a cause of demurrer; in other words, a defendant was permitted to include in the plea any and all debts or demands, which by law he was allowed to set off. Barb. on Set-off, 83; 1 Chit. Pl. 457; 1 East, 369. It was not objectionable to state in the same plea of set-off, any number of debts or demands which the law allowed to be set off. Nor is there now any objection to it under the code. Again, Ib. 422: When two or more notes, judgments or bonds, or other distinct demands are intended to be set off, each of them should be separately and particularly described, with all the allegations or averments necessary to show the liability of the plaintiff, and so as to enable him in his reply to

take issue, by denying any of the material allegations pertaining to each note, judgment or bond, or other particular demand; or to avoid the same by alleging new matter. But all demands constituting the set-off may be contained in the same *statement of new matter* in the answer; each demand, which, in a complaint, should be stated separately, as constituting by itself a cause of action, being separately described or stated, with the necessary averments, and constituting the defense of set-off." There would seem to be no room to doubt that this is a correct view of the pleading in relation to a set-off. Stanbery *v.* Smyth, 13 Ohio St. 495; 4 Ib. 586; 5 Ib. 59, 66.

The subject of set-off is entitled to some further consideration. The New York code includes set-off under the name of counter-claim; under the codes of Ohio, Kansas, and Nebraska, set-off is made itself a ground of defense. All these codes declare that in case of an assignment of a thing in action, the action by the assignee shall be without prejudice to any set-off or other defense *now* allowed. Code, sec. 26. It will be seen that no defense or set-off can be allowed against an assignee or indorsee in favor of the defendant other than what was allowable by the law as it stood when the code was adopted. The words *now allowed* refer to the law as it then was. Hence it becomes important to ascertain what the law then was.

There is one proposition as to which there is no dispute: the indorser of a negotiable bill or note with notice or overdue, or the assignee of a non-negotiable bill or note *bona fide* for a valuable consideration, takes the note or bill subject to all equities or defenses growing out of the note or bill itself, as if without consideration, or on a failure of consideration. But there is some conflict on another point, to wit, whether the defendant can set up a separate and independent cause of action by way of set-off, as against one who holds the bill or note *bona fide* for a valuable consideration and without any notice of the existence of this set-off? On this point there is some conflict of authority. In the early origin of this doctrine of equities in negotiable instruments taken overdue, the defense or equity always grew out of the facts connected with the origin of the note or bill; then came up the cases of a set-off. In Chandler *v.* Drew, 6 N. H. 469, the court held that in a suit upon a negotiable promissory note in the name of the indorsee to whom it has been *bona fide*, and for a valuable consideration, transferred a demand in favor of the maker against the indorser, is not admissible as a set-off, although the note may have been a discredited note when the indorsee took it. Richardson, C. J., delivered the opinion of the

court. "At the common law," he says, "there was no set-off of the unconnected mutual demands and debts between the parties in an action. Each party had his action to enforce the payment of his claims against the other. The law of set-off before judgment is regulated entirely by statute. When the mutual claims of parties have passed into judgment, it is the practice of courts to set off one judgment against another. This practice does not rest upon any statute, but upon the general jurisdiction of courts over the suitors in them. It is an equitable jurisdiction frequently exercised. Mitchell *v.* Oldfield, 4 D. & E. 123; Bourne *v.* Bennett, 4 Bingham, 423; Barrett *v.* Barrett, 8 Pick. 342; Simpson *v.* Hart, 14 Johns. 63; 3 East, 149; 1 M. & S. 240.

"Our statute of February 8, 1791, provides that where there are mutual debts or demands between plaintiff and defendant, one debt or demand may set off against the other. This statute, which is a transcript of the English statute with very slight alterations, and is, in substance, the same as the statutes of New York and Massachusetts, is a very beneficial law, is in its nature remedial, and has always received a very liberal construction.

"The statute speaks of mutual debts between the *plaintiff* and defendant. But this has been construed to mean the *real* and not merely the *nominal* plaintiff and defendant.

"Thus, if the payee of a note bring a suit in the name of an indorser, but for his own benefit, the payee is considered as the plaintiff within the meaning of the statute. 6 N. H. 28; Moody *v.* Towle, 4 Greenl. 415; Carr *v.* Hinchcliff, 4 B. & C. 547; Ruggles *v.* Keeler, 3 Johns. 263; Cains *v.* Wisban, 13 Johns. 9; 10 Ib. 45, 396; Jarvis *v.* Chapple, 2 Chitty, 387.

"It has been held that equitable debts or demands are within the meaning of the statute. Thus a bond assigned to the defendant, although such assignment gives to the assignee no legal right of action in his own name, is a good set-off. Murray *v.* Williamson, 3 Binney, 185; Tuttle *v.* Beebe, 8 Johns. 152.

"Where a factor, dealing for a principal, but concealing the principal, delivers goods in his own name, the person dealing with him has a right to consider him the principal, and may set off any claim he has against the factor in an action brought by the principal. Rabone *v.* Williams and George *v.* Claggett, 7 D. & E. 360. The law is otherwise in the case of a broker. Barring *v.* Corrie, 2 B. & A. 137.

"The distinction is grounded upon the circumstance that a factor has a right to sell in his own name, but a broker in so doing exceeds his authority.

"Where one of a firm appears to the world to be the only person engaged in the business, and to be solely interested, if he sells goods the purchaser may avail himself of any claim he has against such person in answer to an action in the name of the firm. 7 D. & E. 361, note.

"Where a bond is taken in the name of one person for the use of another, a set-off of claims against the person for whose use the bond was given is admissible in a suit on the bond. Bottlin *v.* Brooks, cited 1 D. & E. 621.

"But in an action against two persons these several demands against the plaintiff are not admissible as a set-off, either in a court of law or equity. 4 N. H. 236; 6 Ib. 28; 11 Johns. 70; 4 Johns. Ch. 11; 3 Ib. 351; 2 Merrivale, 121, 122.

"It thus appears that while courts have adhered strictly to the rule prescribed by the statute, they have been very liberal in the application of it, and have looked beyond the parties upon the record to the real parties, and have applied the rule accordingly.

"When the mutual demands between the parties upon the record are not in their nature assignable at law, the circumstance, that a third person has acquired an interest in the demand of the plaintiff, will not, in general, preclude a set-off of the defendant's claim against the plaintiff. Sanborn *v.* Little, 3 N. H. 539. The reason of it is that, in such a case, it is just and reasonable that the assignee should stand in the place of the assignor.

"We were at first inclined to think that the indorsee of a discredited note might be considered as standing in the place of the indorser. But there is an important difference between demands which are negotiable and those which are not so. In the one case the defendant has, by his contract, made the legal title assignable, and has agreed to pay to any one who may have the legal title. In the other case he has made no such contract. When a note is negotiable it may be assigned, and the legal title pass to the assignee, whether it is discredited or not, and whether the maker has a set-off against the payee or not. When a discredited note has been in reality assigned for a valuable consideration, the debt is due to the assignee. And in a suit upon the note, in the name of the indorsee against the maker, the indorsee and the maker are the real as well as the nominal parties. And the indorsee can not be considered as standing in the place of the indorser, unless the note can be considered as still due to the indorser; or the indorser, by taking the discredited note, as having made the set-off his own debt, either of which is repugnant to common sense.

"It would seem, therefore, that the set-off in this case was not admissible, because the demands of the plaintiff and the defendant can not be considered, in any point of view, as mutual demands; and so the claim of the defendant is not within the statute.

"There are, however, cases which are directly in point in favor of the defendant, and which must be examined. These are the cases of Sargent *v.* Southgate, 5 Rich. 312; Ford *v.* Stuart, 19 Johns. 342, and O'Callaghan *v.* Sawyer, 5 Johns. 118.

"These decisions are placed entirely on the ground that he, who takes a discredited note, takes it subject to all objections and equities to which it is liable in the hands of the indorser; and that a set-off is an equity within the meaning of this rule.

"It is, without question, a very just and equitable rule that he, who takes a discredited note, shall take it subject to any legal or equitable defense to which it was liable in the hands of the previous holder. But is a set-off a *defense* within the meaning of this rule?

"Strictly speaking, a set-off *is not a defense.* When a set-off is made, mutual claims to an equal amount on each side become, under the statute, a satisfaction of each other. They operate as a payment of each other. When the claim of the plaintiff is wholly paid by a set-off, the action is at an end, and he may be liable for costs. But his claim has not been defeated by a defense, but has been paid by the extinguishment of claims against him to an equal amount. And, with the exception of the cases to which we have just adverted, no case has occurred to us in which a set-off has ever been considered as a defense, within the meaning of the rule on which the decisions in those cases rest.

"In order to determine whether a set-off be within that rule, we must advert to the statute of set-off, and see what a set-off is, and when it is authorized by the statute. The question is not whether there should be a set-off in a case like this, but whether there can be one under the statute. This last question does not seem to have been examined or considered by the courts, either in Massachusetts or New York, in the cases where it was decided that a set-off was admissible in a case like this.

"The statute authorizes a set-off of mutual demands between the plaintiff and defendant. All mutual demands, equitable as well as legal, between the real parties to the suit, are within the statute. This is the utmost extent of the rule prescribed by the statute. And from the very nature of it, nothing can be set off but a claim against a person whom the defendant has a right to consider the

real plaintiff. But in this case the defendant made the note payable to the order of the payee; and it having been actually transferred to the indorsee, what right has the defendant to consider the indorser as the real plaintiff? On what reasonable ground can the indorser be so considered by any person? We see none.

"The circumstance, then, that the account of this defendant is a claim against the indorser, and would be a good set-off, if the indorser were the real plaintiff, renders it inadmissible, under the statute, in this case. From the very nature of a set-off, an account of the maker of a negotiable note against the payee can not run with the note, and be a defense to it, in the hands of any person to whom it has been legally transferred. The moment the note is actually transferred, the demands must cease to be mutual, and of course must cease to be within the statute.

"In New York, it is now settled that a set-off is only available in consequence of the statute, and in the manner there pointed out, that when a defendant can not place his defense within its provisions, he can derive no benefit from it, and that a set-off can not be made of a debt or demand against any one, other than the plaintiff on the record. Johnson *v.* Bridge, 6 Cowen, 693.

"And in Massachusetts, it seems to be considered, in Peabody *v.* Peters, 5 Pick. 1, that the claim of the defendant in a case like this is not admissible, under the statute, as a set-off, and that the only way in which the defendant can avail himself of a set-off is as a *defense* under the general issue. This is, without doubt, the true view of the subject, if the defendant can avail himself of the set-off, at all, in the suit. But the mistake seems to us to lie, in holding that, what may be a set-off under the statute, between the maker and the payee of the note, and can be a set-off only between them, must be a good defense against the note in the hands of an indorsee, who took it after it was discredited, although in such a case the statute does not apply. What makes a set-off admissible? It is conceded on all sides that it is the statute alone. How, then, there can be a set-off in a case where the statute does not apply, we are wholly at a loss to conceive.

"There is no sound reason why there should be a set-off in cases of this kind. It is true that there may be cases of hardship upon the defendant, without a set-off. But that happens under all general rules. They occur as rarely under the rule which excludes this set-off as under any other rule. If the maker of a note perform services for, or deliver goods to, the payee, he has only to see that they are applied to the payment of the note, and he can never

suffer. If he suffers by having his set-off rejected, it is through his own neglect.

"On the other hand, nothing is more common than the transfer of discredited notes. And if there can be a set-off in these cases, it must be of the general balance due the maker, upon an adjustment of all demands between him and the payee. There can be no sound reason why a set-off should be admitted, if the maker, on an adjustment of all demands between them, is indebted to the payee in the amount of the note. And if the indorsee is compelled, after having paid the indorser the amount of the note, to litigate all demands and accounts between the maker and the payee, to which he is an entire stranger, and subjected to all the expense of the litigation, if the balance in favor of the maker turns out to be equal to the amount of the note, the case of the indorsee may be quite as hard, in some instances, as any that can occur, if the set-off is rejected.

"Besides, if a claim in favor of the maker against the payee is a legal set-off to a discredited note, a claim in his favor, against any other legal holder of the note through whose hands it may have passed, must be equally so. And this may lead to cases of still greater hardship on the side of an innocent indorsee."

In the case of McDuffie *v.* Dame, 11 N. H. 244, the court held that, in an action by the indorsee against the maker of a negotiable note, if the defendant files a set-off against the note, and introduces evidence that the note was not indorsed until discredited, he will be admitted to sustain his set-off, unless the plaintiff shows that he took the note *bona fide* for a valuable consideration. This last decision does not conflict against the former, because in that case the conditions here laid down were present. It would be a fraud for one to buy a note against which he knew the maker had a claim sufficient, or more than sufficient, to balance it, especially if the indorser is insolvent. A transfer under such circumstances must always be for the purpose of avoiding the set-off. But these cases do not apply where the claim of the defendant amounts to what is a payment. A payment is always a defense, though not indorsed on the note, and resting in parol. Whatever the maker could give in evidence, under a plea of payment, can always be given in evidence, under a like plea, against one who took the note when overdue. A payment is attached to the note, and goes along with it, save in one, who is a *bona fide* indorsee before due, for a valuable consideration. He is here excluded on the ground of

public policy, encouraging the circulation of negotiable notes and bills of exchange.

If we examine the code, it will be found substantially to contain the same provisions as the New Hampshire act. The act of 1824 was in these words: "That in all actions and suits brought on any specialty, contract, bill, note, promise, or account, it shall be lawful for the defendant to plead the general issue, and at the same time give notice in writing, to the plaintiff or his attorney, of any debt, contract, book-account, or other liquidated demand against the plaintiff, which he may be desirous to have set off and allowed to him in such action or suit, or of any payment or payments he may have made on such specialty, contract, bill, note, promise, or account; and the court shall render judgment for the party, whether plaintiff or defendant, in whose favor the balance may be found, for the amount of such balance and costs." Stat. of 1841, p. 850. The provisions of the code are substantially the same. Section 93 provides that "the defendant may set forth in his answer as many grounds of defense, counter-claim, or set-off, as he may have." Section 97 says that "a set-off can only be pleaded in actions founded on contract, and must be a cause of action arising upon contract, or ascertained by the decision of the court." And section 371, as to the rendition of judgment, provides in effect for a judgment in favor of the party in whose favor a balance is found. In connection with these provisions, section 26 must be cited, which provides that in case of an assignment of a chose in action, the action by the assignee shall be without prejudice to any set-off, or other defense *now* allowed; but this does not apply to negotiable bills of exchange, bonds, and promissory notes transferred in good faith, upon a good consideration, before due.

These are all the provisions of the code, and it is clear that it is substantially the terms of the prior act. The first provision declares that the defendant may set up in his answer a set-off. What is a set-off? The code does not define it; we must resort to the former practice. But it is to be set up against the plaintiff, because it is in an answer to that action. The set-off, then, must be a cause of action existing in favor of the defendant against the plaintiff, and founded on contract or ascertained by the court. There is here no right to set off a cause of action in favor of the defendant against a third person; it is only by virtue of section 26 that anything of this kind can be done. The claims of the parties to the suit must be mutual; that is, the plaintiff's claim must be one against the defendant, and the defendant's claim must be one

against the plaintiff. The code, then, in regard to set-off, is substantially the same as the act of 1824 and the English act of set-off.

The question of set-off, so far as non-negotiable paper is concerned, did not exist before the code; the action had to be in the name of the original party, though for the use of another, and hence any claim the defendant had, capable of being set off against the plaintiff, was set off between the original parties. In the true sense of the word, there was no set-off allowed on non-negotiable instruments, between other than the original parties. In that class of cases, then, a set-off may be allowed to the same extent as if the action was in the name of the assignor for the use of the assignee. In regard to negotiable instruments, the law is left just where it was before; the rule in the first half of the section is to be applied to negotiable instruments transferred after due. If, then, we are to ascertain the law of set-off in this respect, we must resort to the decisions of courts under prior acts. On this ground I have cited the very able opinion of Richardson, C. J., pretty fully. It states the prior legislation and the decisions on it, which are just as applicable under the code as under prior legislation.

"In the case of Myers *v.* Davis, 22 N. Y. 489, this subject of set-off came under consideration. Denio, J., used the following language in giving the opinion of the court: "The alteration of the practice," he says, "allowing the beneficial owner of a chose in action, not negotiable at law, to sue thereon in his own name, does not change the actual rights of the parties to any assignment of it. The defendants in this action are, therefore, entitled to the same defense which they would have had, if the former rule had continued to prevail, and this action had been brought in the name of Watrous & Lawrence and to no other or different defense. The assignee would have been protected in his equitable rights, notwithstanding the non-negotiable nature of the contract, to the same extent he is entitled to have been protected now that he can prosecute in his own name. The change effected by the code is simply as to the form in which the action is to be carried on.

"An assignee of a chose in action not negotiable, who has given notice of the assignment, is not liable to be prejudiced by any new dealings between the original parties to the contract; but he takes the contract assigned, subject to all the rights which the debtor had acquired prior to the assignment or to the time notice of it was given, where there is an interval between the execution of the transfer and the notice. When this assignment was executed, the defendants, by accepting the order for the manufacture of the

utensils, and entering upon the execution of the work, may have reckoned upon paying the debt, which they owed to Watrous & Lawrence, in that way. If they had completed it before the assignment, the right to a set-off would have attached, of which the defendants would not been deprived by any act of Watrous & Lawrence; but unfortunately for the defendants, no debt had arisen in their favor when Watrous & Lawrence failed and made their assignment; and when a debt afterwards came into existence by the completion of the work, the demand against the defendants had become the property of the plaintiff as a trustee for the creditors of the insolvent debtors. . . . The rule is that when such claims exist in a perfect condition at the same time, either party may insist upon a set-off. So where the one claiming a set-off has a demand against the other, presently payable, and the other party is insolvent, the former may claim to have the set-off made, though the demand of his adversary against him has not become payable. But if, before the demand of the party claiming the set-off become mature, the opposite claim has been assigned, whether the assignment carries the legal or only an equitable title, the right to set-off no longer exists."

The doctrine here laid down is fully supported by all the authorities. If the claim sued on was assigned before the claim of the defendant was payable, then the set-off could not be made, even when the suit was in the name of the assignor. A replication to a plea of set-off setting forth the assignment for value, and that the defendant at that time had no claim due and payable against the assignor, was held good. A bond being assigned and sued upon in the name of the obligee, the defendant can not avail himself of the indebtedness of the obligee created since the assignment of which he had, at the time, notice. Newman *v.* Crocker, 1 Bay, 246. Under the statutes of set-off, set-offs are confined to transactions between the parties to the suit. Holland *v.* Makepeace, 8 Mass. 418; Knapp *v.* Lee, 3 Pick. 452, 460. Thus, in an action against the drawer of a check by an assignee, the defendant was not allowed to set off a negotiable note made by the assignor and payee of the check, which had been indorsed to the defendant before the assignment. Holland *v.* Makepeace, 8 Mass. 418. The court in this case say: "When it is said that the assignment of a negotiable security overdue shall not deprive a defendant of any considerations, which might have been favorable to him, if the action had been brought by the original holder, it is meant that such facts, as would show that the security, at the time of the assign-

ment, had become invalid in the hands of the original holder, should equally avail the defendant against the assignee. But it never could have been intended by the statute, that an assignee should be bound to contest a demand, made by the defendant against his assignor, on a negotiable security, which the defendant might have purchased. This might, in many instances, enable a defendant, by collusion with the assignor, to defeat the effect of an assignment; because the assignee, being a stranger to the transaction relied upon in the defense, could have no means of protecting himself." This reasoning supports the view of the decision in New Hampshire already cited. So where A carried on business in the name of B, and in his name sold and delivered goods to C, and afterward brought an action in B's name against C for the price, it was held that the action was rightly brought in the name of B, and that a claim against A could not be set off. Alsop *v.* Caines, 10 Johns. 396. The reason of this decision is plainly this: B was liable for the debts of the business, and, therefore, entitled to the debts due to the business, and that A had no interest save in the surplus after all debts were paid. So a note given after notice of an assignment, though for a pre-existing liability, can not be set off. Weeks *v.* Hunt, 6 Vt. 15. Where a note, not negotiable, has been assigned to a third person for a valuable consideration, and the maker has promised the assignee to pay him the amount of the note, the maker can not, in an action against him upon the note in the name of the payee, set off claims he may have against the payee. Wiggin *v.* Damrell, 4 N. H. 69; Gould *v.* Chase, 16 Johns. 226. The assignee of a note can not file the same in set-off against the maker, unless the assignment was made before suit brought on the debt of the maker against the assignee. Gross *v.* Van Wick, Minor, 7. So in an action by the indorsee against the drawer of a promissory note payable at a particular bank without defalcation or discount, the defendant can not set off a demand he may have against the bank which discounted the note and transferred it to the plaintiff. Tillon *v.* Britton, 4 Halst. 120. *Vide* also Stewart *v.* Anderson, 6 Cranch, 203; Stocking *v.* Toulmin, 3 Stew. & Porter, 35. A note purchased for the avowed purpose of set-off after suit commenced, is not admissible as a set-off. Carpenter *v.* Butterfield, 3 Johns. Cas. 145. Where a note overdue is transferred, the maker can not set off a demand against the payee, if, at the time of transfer, the payee has demands against the maker greater than the set-off. Collins *v.* Allen, 12 Wend. 356; Driggs *v.* Rockwell, 11 Wend. 504. Where mutual demands exist between parties, one of them

can not, by an assignment of his cause of action, defeat the right of the other to set off the judgments rendered. Hooper *v.* Brundage, 22 Maine, 460. The claim in this case was assigned, while the suits were pending. The payee of a note indorsed it and delivered it as a collateral security to certain of his creditors, who caused a suit to be brought thereon in the name of a nominal plaintiff, after which the payee settled the demand for which the note was given as security; and it was held that after such settlement the defendant in such action might set off a note from the payee to himself. Bellows *v.* Smith, 9 N. H. 285. It is a good replication to a plea of set-off of a judgment recovered, that the whole judgment has been assigned to a third person of which notice had been given to the judgment debtor. Day *v.* Abbot, 15 Vt. 632. When the first indorsee of a promissory note negotiates it after due, and the second indorsee brings an action thereon against the maker or first indorser, the defendant can not set off any claim which he has against the first indorsee, except such as existed at the time of the transfer of the note to the plaintiff, although he had no notice of such transfer when he acquired the claim against the first indorsee. Baxter *v.* Little & Harris, 6 Met. 7. In Baxter *v.* Little & Harris, 6 Metcalf, 7, 10, Shaw, C. J., states the law of set-off in regard to negotiable instruments as well as non-negotiable ones, and discriminates between the two: "When a negotiable note is indorsed," he says, "and transferred after it is due, and the defendant relies upon matter of set-off, which he may have against the promisee, he can avail himself only of such matter of defense as existed between himself and the promisee at the time of the actual indorsement and transfer of the note to the holder. A note does not cease to be negotiable, because it is overdue. The promisee, by his indorsement, may still give a good title to the indorsee. Notes or other matters of set-off, acquired by the defendant against the promisee, after such transfer, can not be given in evidence in defense to such note, although the maker had no notice of such transfer, at the time of acquiring his demand against the promisee. Having made his promise negotiable, he is liable to any *bona fide* holder and actual indorsee; and, therefore, even after the note has become due in making payments to the original promisee, or in further dealings by which he gives him a credit, he has no right to presume, without proof, that the promisee is still the holder of the note. Besides, in case of payment of a negotiable note, or of a credit, which the maker intends shall operate by way of payment, he has a right to have the note given up, if paid in full, or

to see the payment indorsed, if partial. If he insists on this right, in the case proposed, he would at once perceive that the person to whom he was making payments, or giving credit, is no longer the holder of the note. And this appears to us to be the true distinction between the indorsement of a note overdue, and the assignment of a chose in action. In the latter case, notice of the assignment must be given by the assignee to the debtor, to prevent him from making payments to the assignor. Without such notice, he has no reason to presume that the original creditor is not still his creditor, and payment to him is according to his contract, and in the due and ordinary course of business. The assignee takes an equitable interest only, which must be enforced in the name of the assignor; and, until notice, he has no equity against the debtor, which can be recognized and protected by a court of law or equity. The indorsee of a note overdue takes a legal title; but he takes it with notice on its face that it is discredited, and, therefore, subject to all payments and offsets in the nature of payments. The ground is that by this fact he is put upon inquiry, and, therefore, he shall be bound by all existing facts, of which inquiry and true information would apprise him; but these could only apprise him of demands then acquired by the maker against the payee."

The court also allude to the case of Sargent *v.* Southgate, 5 Pick. 312, and say the case does not warrant the marginal note that all claims *acquired before notice of the transfer* could be set off. "No such decision," says the judge, "was called for in that case, because all the demands relied upon by way of set-off were acquired by the defendant, whilst the original payee was the holder of the note. But further, on a careful examination of the opinions, we think it will not be found that there is any such *dictum* in regard to notice." The judge further says that "the English rule, in allowing set-off in an action upon a note, is somewhat more limited than our own, confining such defense to equities arising out of the same note, or transactions connected with it. Burrough *v.* Moss, 10 B. & Cress. 558. This English case is in accordance with the case of Chandler *v.* Drew, 6 N. H. 469, and in my opinion is the better law. The phrase that the indorsee of a note or bill overdue takes it subject to equities, is derived from a court of equity, and in that court its application is limited to equities growing out of the case set up in the petition, and has no reference to any other dealings or contracts between the parties. It would seem, therefore, that the rule thus borrowed from a court of equity should have the same meaning and application in the one court as the other. *Vide* also Heger-

man *v.* Hyslop, Anthon, 197; Spencer *v.* Barber, 5 Hill, 568; Graves *v.* Woodbury, 4 Hill, 559; Mead *v.* Gillet, 19 Wend. 397; Chilton *v.* Comstock, 4 Ala. 58; Northern Bank *v.* Kyle, 7 How. (Miss.) 360; Ward *v.* Martin, 3 Mon. 18; Johnson *v.* Pearson, 7 Dana, 374; Wells *v.* Teall, 5 Blackf. 306; Hurd *v.* Earl, 4 Blackf. 184. The case of Call *v.* Chapman, 25 Maine, 128, sustains the decision in the case of Chandler *v.* Drew, 6 N. H. 469, in holding that, as against the indorsee of a negotiable note, the defendant could not set off the negotiable note of the payee, though acquired before the transfer. If a surety for a debt pay the same before due, the payment will, after the debt has become due, but not before, be a legal set-off against his note payable to the principal and held by him. Jackson *v.* Adamson, 7 Blackf. 597.

In equity the rule is somewhat different from what it is at law. The ground of its interference is, that from the insolvency of some of the parties, others will lose if they are compelled to pay the insolvent party, and be driven to an action against the insolvent for his claim. An equitable set-off may be obtained in equity by cross-bill, when the complainant in the original bill is insolvent, so that the defendant will lose his debt unless the set-off is obtained. Knapp *v.* Burnham, 11 Paige, 330. A demand other than a judgment can not be set off at law or in equity unless owned by the defendant at the time when the suit was commenced. Ib. The right to a set-off, upon summary application to a court of law or equity, exists only in cases where the debts on both sides are liquidated by judgment or decree before the assignment of either to a third person. Barber *v.* Spencer, 11 Paige, 517. The right of set-off in chancery exists independent of the statute of set-off, and is not subject to them. Jeffries *v.* Evans, 6 B. Mon. 119. The law is thus stated by Walworth, Ch., in Lindsay *v.* Jackson, 2 Paige, 581, 582. "But the court of chancery, says the chancellor, even before the statute, recognized the principle of natural equity, and acted upon it in cases where the law could not give a remedy in a separate action in consequence of the insolvency of one of the parties. Thus, in Hawkins *v.* Freeman, 2 Eq. Cas. Abr. 10, which was decided by Lord Macclesfield five years before the statute of set-off was passed, the court of chancery interfered to enforce this natural equity, as between the administrator of an insolvent estate and the complainant, between which complainant and the intestate there were mutual demands. The same principle of natural equity was recognized by Lord Chief Justice Hale many years before. See Chapman *v.* Derby, 2 Vern. 117. And at this day, if the court

finds a case of natural equity not within the statute, it will permit an equitable set-off, if, from the nature of the claim, or from the situation of the parties, it is impossible to obtain justice by a cross-action. See Piggott *v.* Williams, Mad. & Geld. 95."

Where there are mutual demands between the parties, which can not be set off under the statute, but which a court of equity may compensate or apply in satisfaction of each other without interfering with the equitable rights of any person, the fact that one of the parties is insolvent has frequently been held a sufficient ground for the exercise of the equitable jurisdiction of the court of chancery. *Vide* Lord Lanesborough *v.* Jones, 2 P. Wms. 325. In Pond *v.* Smith, 4 Conn. 302, the Supreme Court of Connecticut held that the insolvency of one of the parties was a sufficient ground for the interference of a court of chancery to offset mere legal demands against each other, although they were so situated as to be incapable of being set off at law; and that the complainant ought not to be left to pursue his legal remedy against the defendants when, from their insolvency, no satisfaction of his demand could be thus obtained. The same doctrine is maintained in the case of Searchet *v.* Adm'r of Searchet, 2 Hammond (O.), 320. In this case it was held that where, upon the adjustment of a partnership, two parties are in equity creditors of a third partner, such credits in chancery might be set off against a joint debt due from the same two partners to the third, although from the unliquidated nature of their claims it could not be done at law. *Vide* also Collins *v.* Farquar, 1 Littell, 153; Robbins *v.* Hawley, 1 Mon. 194; Prior *v.* Richards' Adm'r, 4 Bibb, 356; Bull *v.* Townsend, Littell Select Cases, 325. Gardner, J., in Bradley *v.* Angel, 3 Comst. 475, 477, says: "But it has been held in this State that A having a demand against B, which is *due*, and B one against A not due, A may in equity compel a set-off if B be insolvent." The case in 2 Paige, 581, had held the contrary.

These cases sufficiently show in what cases equity will interfere; it is where, if the law ran its course, one party being solvent would have to pay a debt to another who was insolvent, while he had a claim against him which for some reason could not be set off at law. One debt might grow out of an unsettled partnership, or from some other equity, or it might be in favor of two, but one had to pay it. There can not be a set-off at law of a debt due two in a suit against one by the debtor, though in equity the one sued owns the whole claim.

In the case of Straus *v.* Eagle Ins. Co., 5 Ohio St. 59, our Su-

preme Court laid down this rule: that a set-off can only be allowed for such claims as in good faith and absolutely belonged to the party at the commencement of the action, and does not extend to claims purchased conditionally for the purpose of using them as a set-off, and with an agreement to return them to the seller if they are not so used. The statute was designed to avoid circuity of action, by enabling the defendant to obtain the benefit of his own joint claims against the plaintiffs; but it would be a fraud to allow him, in anticipation of a lawsuit, to get the use merely of the claims of others, with which to defeat his adversary. Per Ranney, J., Ib. 66.

In the case of Follet, Adm'r *v.* Buyer, 4 Ohio St. 586, 591, Thurman, C. J., says: "But it is a mistake to suppose that it was the design of the statute to create an unlimited right of set-off, as against an assignee; or, in other words, to allow every set-off against him that would be available against the payee, had the note never been transferred. When an overdue or non-negotiable note is assigned, the assignee takes it subject to all the equities existing between the payee and the maker; and hence it is competent for the latter, notwithstanding the assignment, to show that it was obtained by fraud, or without consideration, or that before he received notice of the assignment, it had been paid or otherwise discharged. So, too, he may set off any liquidated demand which he held against the payee when he first obtained information of the assignment, but not claims subsequently acquired, even though they had their origin in previous transactions.

"The general principle that, as against a *bona fide* assignee, there can be no set-off of demands upon the assignor acquired after notice of the assignment, and that a court of law is fully competent to protect the assignee, is certainly well established. Pancoast *v.* Ruffin, 1 Ohio, 381; Weakly *v.* Hall, 13 Ohio, 174.

"That a mere contingent liability, not even reduced into judgment, as surety for the assignor, is not a demand upon him, would seem to be sufficiently obvious; and where nothing more exists at the date of the assignment, and the assignor is solvent, a subsequent payment of the surety, in discharge of such liability, will not give him a right of set-off as against the assignee. Granger's Adm'r *v.* Granger, 6 Ohio, 35. Our judgment resolves the question against the intestate at his death. A liability only was incurred, upon which, on the contingency of the security being compelled to pay for the intestate, he would have a right of action for his indemnity. A bare possibility that, in a certain future con-

tingent event, he would have a demand, is not a debt due from the intestate, and such a claim has not the mutuality required for a set-off." The case was one of an equitable assignment, and not a case of the legal transfer of a negotiable note or bill.

In the case of Stanbery *v.* Smyth, 13 Ohio St. 495, the court held that the defendant could not set-off a part of a claim assigned to him, it would allow the splitting up of claims, which is never done. In Miller *v.* Florer 15 Ohio St. 148, the court held that under the code the right of set-off exists against the persons who are the equitable owners of the demand in suit.

Where a note having been transferred, when past due, to one who was to use the avails, in his discretion, for the benefit of the payee's family, the maker can not set up by way of set-off that the payee was at the time of the transfer, indebted to him for advances made to a firm of which they and a third person, not a party to the suit, were partners, of which no account had been stated, though the payee die insolvent subsequent to the transfer. Conceding that there is now no objection to setting off against a legal demand, a claim arising out of contract, which can only be liquidated in equity, the set-off is inadmissible for the want of a party—the third partner—who would be essential to a suit for the establishment of the claim. Cumings *v.* Morris, 25 N. Y. 525. In this case the court seems to hold that an unsettled partnership account can not be made the subject of a set-off, since there is no debt due from one partner to another. "It is clear," says Wright J., "that the unadjusted partnership claim could not be set off at law. It was not a claim, which existed and was due and payable, and belonged to the defendant before the notes were transferred, nor was it a demand against Sargeant alone, but against him and the partner Allen jointly. It was not liquidated, nor could it be without a statement and settlement of the partnership accounts. There was no account stated between the defendant and Sargent, nor were the affairs of the partnership settled in any way. At the time such partnership closed, if it did so on the completion of the Flushing railroad, the notes had been transferred over three months. And until the affairs of the partnership are closed and settled, it can not be said that any debt exists from either partner to the other." Beckwith *v.* Union Bank, 5 Seld. 211; Beebe *v.* Bull, 12 Wend. 504; Plets *v.* Johnson, 3 Hill, 112; Ladue *v.* Hart, 4 Wend. 583.

In the case of Smith *v.* Felton, 43 N. Y. 419, the right of set-off in equity is somewhat discussed and the law stated. It was held that in equity the amount of a partnership deposit with an insolv-

ent banker was a proper subject of set-off in an action brought by the assignee in trust for creditors of such banker, on a note held by the banker, made by one of the partners, and indorsed by the other for partnership purposes, although such note was not due at the time of the assignment. The court say: "The form of the defendant's obligation and that at law they were severally and not jointly liable, is not material. They were both liable upon the same instrument for a firm debt; and equity will look through the form of the transaction, and adjust the equities of the parties, with a view to its substance, rather than its form, so long as no superior equities of third persons will be affected by such adjustment."

The debt to be set off must be mutual, must be between the parties to the suit, save in cases of assignment; hence, if two are sued, a debt in favor of one can not be set off; or if one is sued, a debt in his favor and another can not be set up as an offset by the one sued against the plaintiff.

In an action proper for a set-off against several defendants, severally or jointly and severally liable, any one of them may avail himself of his set-off; or any number of the defendants, to whom the set-off is jointly due, may avail themselves of such set-off. Parsons *v.* Nash, 8 How, 454; Briggs *v.* Briggs, 20 Barb. 477; 15 N. Y. 471; but if they are jointly liable, one of them can not avail himself of a demand on contract in his favor individually against the plaintiff. Peabody *v.* Bloomer, 3 Abb. 353; S. C., 5 Duer, 678; 6 Ib. 53; Mott *v.* Burnett, 2 E. D. Smith, 50.

In the case of West *v.* Meddock, 16 Ohio St. 417, the court held that the plaintiff could not in a reply set up by way of a set-off, that the defendant was indebted to him in dealings distinct from those set up in petition and answer.

Can an unliquidated claim founded on contract be plead by way of set-off? Prior to the code, none but what was called a liquidated claim could be plead as a set-off. The old statute named certain kinds of claims and other *liquidated* claims. Under this language, it was always held that the claims of the character named must be liquidated; it was not every cause of action founded on contract that could be available as a set-off; it must still be what is called a *liquidated* claim. The code is brief on the subject of set-off; says it must be a cause of action arising on contract, or ascertained by the decision of the court. These last words are equivalent to the word "unliquidated" in the prior act. It would be strange if one action of covenant broken could be met by another action of the same kind; so that the jury would have to try

two actions, having no connection with each other, and both sounding in damages. I can find no case looking to this question, save the case of Cummings *v.* Morris, 25 N. Y. 625. Wright, J., in his opinion, says the claim is not liquidated, which clearly implies that is essential to the demand to be set off. The counter-claim admits a cross-action for damages, but such cross-action is limited to the transaction or contract out of which the plaintiff's claim arose. This necessarily implies that such claims can not generally be set-off.

CROSS-PETITION.

The act of April 8, 1857, has added the following to section 84, 54 Ohio L. 91:

"Any defendant, who is properly made a defendant, may claim, in his answer, relief touching the matters in question in the petition against the plaintiff or against other defendants in the same action."

This is a new provision introduced into the code, and needs a careful consideration. We will examine its various terms in their order:

1. The person authorized to ask in his answer for relief must be a defendant and a *rightful* defendant in the action. He must appear to be a necessary party to the case made by the plaintiff; if he is not such a defendant, he can ask for no relief against any one; although he may have some claim against a co-defendant, yet he can ask for no relief against him, unless he himself is a necessary defendant to the case made by the plaintiff in his petition. He is not *properly made a defendant*, unless such is the case.

2. The relief asked must relate to the matters stated in the petition; *relief touching the matters in question in the petition.* The relief asked then must grow out of the case made by the plaintiff in his petition; the defendant can not set up a *new claim*, and ask for relief on that; his right to relief must depend upon the case stated in the petition, and not upon a case to be stated by himself. A few examples will make the meaning of this clause more clear, so clear that it may not be misunderstood. A vendee of real estate files a petition to set aside the contract; the vendor will now be permittted not only to deny the right to a rescission of the contract; but he may go on in his answer and aver performance on his part, and ask that the plaintiff (the vendee) be required to execute said contract of sale. So, too, if the vendor applies for a specific performance, the vendee may set up facts, and ask for a

rescission of the contract. In all cases where a plaintiff asks for the execution of an agreement, the defendant may not only show that the plaintiff has no right to an execution of it, but he may also set up such facts as entitle him to a vacation of the contract, and pray that the same may be done. Under the practice in chancery, the defendant in such cases could only defeat the plaintiff's claim; he had himself to bring a suit, if he wished to have the contract set aside; but under this provision, the defendant can obtain all the relief he would have been entitled to in a separate action. So, if a party to a note files a petition to set it aside, the defendant may not only deny his right to have it declared void, or rescinded; he may also claim a judgment against the plaintiff for the amount due him on the note.

As to judgments by one defendant against another. This can seldom occur, though cases do occur, where under this provision, such a judgment might be rendered. If an assignee of a real contract files a petition against vendor and assignor and vendee, and the vendee and assignor was to deny the assignment, or the right of the assignee to a conveyance as against him, he might also ask that his co-defendant (the vendor) might be decreed to convey the land to himself. So where an assignee of a judgment files a petition against the defendant and plaintiff in the judgment, the plaintiff in the judgment, if he denied the right of the assignee, might ask for the benefit of the action as against his co-defendant, as though he had himself filed the petition. In cases, where the amount due on a non-negotiable note has been assigned to two persons, and one of them files a petition against the maker and his co-assignee, the assignee may ask for a judgment against his co-defendant, the maker of the note, for the amount coming to him. Certain parties executed their non-negotiable note to a bank; the bank, afterward, assigned one-half the money due on the note to one, and the other half to another. The charter of the bank then expired. A bill was then filed by one of the assignees against the makers of the note and the other assignee, praying for a judgment against the makers for the sum due him; the other assignee set up in an answer his interest and asked for a judgment against his co-defendants, the makers, for the sum due him on the note; and, in Kentucky, it was held that such judgment could be rendered. In that State, this provision has long constituted a part of the chancery law.

In all these cases, it will be seen that the relief grows out of the case made by the plaintiff, and not out of any case set up by the

defendant. In these cases, if the plaintiff is not entitled to what he demands, the defendant is, on the same case, entitled to some kind of relief; under the old practice, he was compelled to bring a new action to obtain it; now he can set up his claim to relief in his answer, and if he succeeds in defeating the plaintiff's case, he becomes entitled to the same relief he would have been, if he had gone into court on the same transaction. In the case of co-defendants, the case made by the plaintiff must show that one of the defendants has certain rights to relief against another defendant, growing out of the same contract or transaction, set up by the plaintiff, as the facts constituting his right of recovery; as where one *cestui que trust* files a petition against the trustee and other *cestui que trust* calling for an account of the trust; all the *cestuis que trusts* may have judgments against the trustee for the respective amounts coming to each, just as though all were plaintiffs.

This provision can only apply to actions founded upon rights heretofore the subject of chancery jurisdiction. In actions at common law, a failure of the plaintiff to recover extinguishes not only all the rights of the plaintiff against the defendant, but of the defendant against the plaintiff, growing out of the case made by the plaintiff. A failure to recover on a note, or other contract, extinguishes those contracts as much as though they were set aside in equity; but in the cases put, a failure of the plaintiff to recover on the case made by himself, leaves in the defendant a right to relief against the plaintiff on the same transaction. This state of things can hardly arise except in a case founded upon principles of equity.

This provision was probably introduced in consequence of the decision in the case of Klonne and wife *v.* Bradstead et al., 7 Ohio St. 322. That decision was open to great doubt as to its correctness, and this provision was inserted to settle that doubt. This provision is equivalent to the cross-bill in the old chancery practice, and this act makes the answer equivalent to a cross-petition, if it states such facts as a cross-petition would have contained, and a prayer is added for the particular relief which the party wishes to obtain, and the name of the person from whom the relief is demanded. If we resort to the law in equity regulating cross-petitions, it will aid us in understanding this addition to the code.

As a defendant can not pray anything in his answer, except to be dismissed the court; if he has any relief to pray, or discovery to seek, he must do so by a bill of his own, which is called a cross-bill. Lube's Eq. Pl. 39. A cross-bill is a bill brought by a defend-

ant against a plaintiff, or other parties in a former bill depending, touching the matter in question in that bill. Mitf. Eq. Pl. 80, 81; Story's Eq. Pl., secs. 389, 402; White *v.* Buloid, 2 Paige, 164. It is treated as a mere auxiliary suit, or as a dependency upon the original suit, Story's Eq. Pl., sec. 399; Slason *v.* Wright, 14 Vermont, 208; and can be sustained only on matter growing out of the original bill. Daniel *v.* Morrison, 6 Dana, 186.

A bill of this kind is usually brought either to obtain a necessary discovery of facts in aid of the defense to the original bill, or to obtain full relief to all parties, in reference to the matters of the original bill. Mitf. Eq. Pl. 81; Story's Eq. Pl., sec. 389. In cases of discovery, a cross-bill is no longer needed, since an examination of the parties gives all a cross-bill could attain, and probably more. But the other ground still subsists, and is provided for in this provision of the code.

It frequently happens, and particularly if any question arises between two defendants to a bill, that the court can not make a decree without a cross-bill to bring every matter in dispute completely before the court. Rogers *v.* McMacham, 4 J. J. Marsh. 37; Troup *v.* Haight, 1 Hopk. 239. In such a case it becomes necessary for some one of the defendants to the original bill to file a bill against the plaintiff and other defendants in that bill, or some of them, and bring the litigated point properly before the court. Pattison *v.* Hall, 9 Cow. 747. One defendant can not have a decree against a co-defendant without a cross-bill with proper prayer and process, or answer as in an original suit. Talbot *v.* McGee, 4 Mon. 379; Elliott *v.* Pell, 1 Paige, 263.

A cross-bill is a mode of defense. Field *v.* Schieffelin, 7 Johns. Ch. 252; Galatian *v.* Erwin, 1 Hopk. 48; S. C., 8 Cow. 361; Cartwright *v.* Clark, 4 Metcalf, 194. The original bill and the cross-bill are but one cause. It must be confined to the *subject matter* of the original bill, and can not introduce new and distinct matters not embraced in the original suit; and if it do so, no decree can be found on these matters. May *v.* Armstrong, 3 J. J. Marsh. 262; Daniel *v.* Morrison, 6 Dana, 186; Gouverneur *v.* Elmendorff, 4 Johns. Ch. 357. The plaintiff in a cross-bill can not contradict the assertions in his answer in the original bill, Hudson *v.* Hudson, 3 Rand. 117; and where the allegations of a cross-bill are inconsistent with the admissions of the answer, they can not be taken as true, though unanswered. Savage *v.* Carter, 7 Dana, 414. A cross-bill, if seasonably filed, may be sustained for the purpose of

obtaining an equitable set-off. Cartwright *v.* Clark, 4 Metcalf, 104; Troup *v.* Haight, 1 Hopk. 239.

It lies also to have an agreement, sought to be specifically executed, delivered up, or canceled; for, although the plaintiff should fail to obtain a decree under his original bill, he might still bring his action at law for damages sustained by the non-performance. Cooper's Eq. Pl. 86, 87. If the only object of a bill be to enforce a contract, a cross-bill to rescind a different contract and with other parties about the same property, will not lie. But where the vendor of land, among other things in his bill, asserts a lien for the purchase money, against an assignee of his covenant for title, the latter may sustain a cross-bill for a rescission of that contract. Wickliffe *v.* Clay, 1 Dana, 589. Where a bill is filed to set aside an agreement or conveyance, the conveyance or agreement can not be confirmed or established without a cross-bill filed by the defendant. Connochan *v.* Christie, 11 Wheat. 446. It seems that a cross-bill is always necessary, where the defendant is entitled to some positive relief, beyond what the scope of the plaintiff's suit will afford him. Pattison *v.* Hull, 9 Cow. 747. The proper time for filing a cross-bill, where such bill is necessary, is at the time of the putting in the answer to the original bill, and before the issue is joined by the filing of the replication. And as the matters of defense, upon which a cross-bill is founded, must be stated in the answer to the original suit, as well as in the cross-bill, it can seldom be necessary to delay the filing of the cross-bill till after the original cause is at issue. Irvin *v.* DeKay, 10 Paige, 319, 322; Cartwright *v.* Clark, 4 Metcalf, 110, 111.

Upon hearing a cause, it sometimes appears that the suit already instituted is insufficient to bring before the court all matters necessary to enable it fully to decide upon the rights of all the parties. This most frequently happens where persons in opposite interests are co-defendants, so that the court can not determine their opposite interests upon the bill already filed, and the determination of their interests is yet necessary to a complete decree upon the subject matter of the suit. In such a case, if upon hearing the cause the difficulty appears, and a cross-bill has not been exhibited to remove the difficulty, the court will direct a bill to be filed, in order to bring before it all the rights of all the parties fully and properly for its decision, and will reserve the directions or declarations which it may be necessary to give, or make, touching the matter not fully in litigation by the former bill, until this new bill

is brought to a hearing. Mitf. Eq. Pl. 82,83; 1 Smith's Ch. Pr. 460; Story's Eq. Pl., sec. 396; Field *v.* Schieffelin, 7 Johns. Ch. 253, 254; Pattison *v.* Hull, 9 Cow. 747; Cartwright *v.* Clark, 4 Metcalf, 104.

And if a creditor, who has come in under a decree in favor of creditors against a debtor, should require relief for the purpose of assisting the investigation of demands affecting the estate, before the master, which relief can not be obtained under the original bill, or by a rehearing, he may, even without the direction of the court, file a cross-bill for the purpose; for he might not have had an opportunity, at an earlier stage of the proceedings, of presenting his case and his objections. Latouch *v.* Dunsany, 1 Sch. & Lef. 137; Story's Eq. Pl., sec. 397.

A cross-bill should state the original bill and the proceedings thereon, and the rights of the party exhibiting the bill, which are necessary to be made the subject of cross-litigation, or the ground on which he resists the claims of the plaintiff in the original bill, if that is the object of the new bill. 3 Daniels' Ch. Pr. 1746. It must be confined to the *subject matter* of the original bill, and can not introduce new and distinct matters not embraced in the original suit; and if it do so, no decree can be founded on those matters: for, as to such matters, it is an original bill, and they can not properly be examined at the hearing of the first suit. A demurrer was allowed to a cross-bill to have usurious securities delivered up, because it did not offer to pay the sum really due. Mason *v.* Gardiner, 4 Brown Ch. C. 436. Whenever a cross-bill is brought against co-defendants in a suit, the plaintiff in such suit must be named a defendant together with them. Cooper's Eq. Pl. 85.

I refer for the above statement of a cross-bill to 3 Daniels' Ch. Pr. 1742, where the whole subject is discussed. This provision is permissive, and not mandatory. The right to file a cross-bill still exists, if the party chooses to select that course; but in that case a new service will have to be made, as in the original action against the defendants in the cross-petition; while, by an answer in the nature of a cross-petition, no new service is necessary, as the answer is a part and parcel of the original action, in which the parties are already before the court. It will, therefore, be preferable to set up the claim of the defendant in his answer. The answer need not state all that a cross-bill was required to state, because the original case is a part of the proceedings already, and therefore need not be repeated. No more need be stated than is necessary, in addition to the statements of the petition, to show the de-

fendant's right to the relief he demands, with the necessary prayer for that specific relief which he seeks. The answer, after meeting the facts set up in the petition, as though no cross-relief was to be sought, will then proceed, as in an original petition, to state the case of the defendant and the grounds of the specific relief for which he is to ask.

The cases are numerous in which this course may be taken. If an elder or younger mortgagee files a petition to foreclose, no foreclosure can be had by a defendant having another mortgage on the same premises, or a judgment lien, unless he file an answer in the nature of a cross-petition; and hence, if the plaintiff's claim is settled or paid off without a sale, the whole action is at an end; but if the defendant wishes himself to force the payment of his own mortgage or lien, come what may with the plaintiff's case, he must in his answer set up his mortgage, as in an original suit by him, and ask for an account and a sale of the premises, if the claim is not paid by a day to be fixed by the court. So if the defendant wishes to set aside an agreement sued on, he must in his answer set up the grounds on which he claims a rescission, and pray for it. So in every case where a defendant has affirmative rights, growing out of the matters set up in the petition, which he can enforce against either the plaintiff or a co-defendant or defendants, he may, in an answer in the nature of a cross-petition, set this right up and pray for affirmative relief, as he could in a petition embracing the same matter. This has been the practice in Kentucky for a long time, and her decisions will explain the mode of this proceeding and the practice under it; though there can be little or no difficulty in practice, after thoroughly mastering the nature and use of a cross-petition, for whatever case would justify the filing of a cross-bill will justify the defendant in setting up the same matter for relief in an answer in the nature of a cross-petition or bill.

The answer being filed setting up the claim, all the parties to the suit having adverse claims to the one set up, may reply to it, and thus raise whatever issues the rights of all parties to the matters or claim set up therein may require. Whether any other pleading can be had may be debatable. The code says a reply shall be the last pleading in a case; and yet in this matter, thus set up in the answer, the reply is an answer. A reasonable construction of the code would be to allow an answer to the case, so far as it is a cross-petition, and then a reply to that answer. The pleadings then would be the same, as in case of a cross-petition under the code.

The original code did not provide for a cross-petition in the answer; and this is a reason more, why, when it is allowable to set up a case for affirmative relief in favor of a defendant, the answer should be treated as it is—a *petition*—and the pleadings should follow the cause allowed on the petition in any other case. By that construction, pleadings will be uniform in all cases, and the rights of parties made uniform in a court of justice, however the action may originate, whether by a petition or by an answer.

How New Matter is to be Pleaded.

Little is necessary to be added on this point to what was said under the head of petition. The character of the answer must, like the petition, depend upon the nature of the case—whether it is one founded on legal or equitable rights. There must, from the very nature of things, be a difference between an answer to a case of equity and one to a case at law. We will first consider the question as it relates to a case at law.

The object of the answer here is to bring the dispute between the parties to an issue—to an affirmation on the one side and a denial on the other. This is necessary to enable the court to know clearly what is the issue to try, and the jury to respond understandingly and distinctly to this issue. A jury still being the tribunal to pass upon the facts, definiteness and clearness in the issues are just as important as ever. In cases, then, at law, all of which are to be tried by a jury, if either party requires it, the answer must be substantially what a plea was under the old system. The facts relied upon as a defense must be clearly, distinctly, and methodically stated, so as to present a single point or issue, which, if found for the defendant, will enable the court to render a judgment in his favor. Hence an answer which sets up a payment, tender, release, accord and satisfaction, statute of limitation, former recovery, etc., must be substantially what a plea setting up those defenses was. Of course, it need not have all the same formality, but it must contain the substance of a plea. Nothing less than that will contain all that is necessary to constitute a defense. Nor can anything be briefer than the form of these old pleas as they have been used in Ohio, stripped as they have been of all unnecessary verbiage. And experience has demonstrated that, where they have not been substantially followed, pleadings have been doubled and trebled in length. If this course be followed, the pleader may be sure he is right. If he undertakes in each case to *improvise* forms, he can never be certain he is right until the court has

passed upon it; and the court may construe his language very differently from what he did himself, and thus he may find himself out of court on a simple misunderstanding; whereas, if forms are used which have acquired a fixed legal meaning, there is no room for misunderstandings. The court and the bar know exactly what that formula means. Who ever heard of any dispute as to the meaning of a plea of release, payment, former recovery, statute of limitation, etc.? The language in which they are expressed has been defined so clearly that no one can misunderstand or misconceive what they must mean.

The same is true whenever an equitable defense is to be put in as an answer to a suit at law. The facts must be briefly and methodically stated, and nothing but the facts must be stated. This is a matter of some difficulty, unless the pleader distinctly comprehends the distinction between the *facts* which constitute the defense, and the *evidence* by which those facts are to be proved. Experience under the code shows that *evidence* is much oftener stated in the pleadings than the *facts;* and hence the pleadings are confused and of unnecessary length. The answer setting up an equitable defense, must not be like an answer or bill in chancery in a similar case; because in equity pleading both facts and evidence were generally stated, in order to obtain an admission from the adverse party of the truth of the evidence. Equity pleading also allowed the pleader to go into a detailed statement of the facts and evidence, which is inconsistent with pleadings at law, in cases to be tried by a jury. Let us take an instance: A defendant claims he is a surety, and has been released by the conduct of the plaintiff. What are the *facts* in such a case? That he is a surety; that the plaintiff knew it; and that he, for a valuable consideration, agreed with the principal, without the consent of the defendant, to extend the time of payment from such a time to such a time. Here are the facts, and all the facts; the evidence to prove them may be very various and voluminous.

In cases depending upon principles of equity, the answer, like the petition, must be varied somewhat from the naked forms of a legal plea. The code, however, has varied very much the law regulating answers in equity cases. In chancery, the defendant had to answer the whole bill, as nothing was admitted by an omission to answer; now, every averment not denied is admitted, and need not therefore be answered to. Where, therefore, the answer looks simply to a denial, it need take no notice of any averments, save those which the defendant intends to deny. If the case stated in

the petition is incorrectly stated, the defendant may deny generally the allegations contained in the petition. If, when the case is heard, there is a variance between the case made in the petition and the case proved, the petition must be dismissed or amended at the costs of the plaintiff. Under the practice in chancery, the defendant was bound to set up what were the facts or contract, as understood by him, and in that way notify the plaintiff if he claimed a different case from that stated in the bill. The plaintiff could then amend or not, as he claimed the facts to be. Under the code, it would seem, nothing of this kind is required of the defendant. All discovery is discarded, and the answer is now a mere pleading; and, as such pleading, it must either deny the case made, or set up new matter constituting a defense. If the defendant has made a contract, but one different from that stated in the petition, he meets the case made by a simple denial; an answer that he had made a different contract would be of no value or validity, unless preceded by a denial of the one set out; and after that denial, the balance of the answer would be redundant and immaterial. The issue must be on the denial, and not on any case stated in the answer and not set up in the petition.

If the code is to be construed literally, then the answer in an equity case is cramped down to all the strictness of pleadings at law. The answer must either be a denial, or the statement of new matter constituting a defense, etc.; and each new matter amounting to a *defense* must be stated separately. If, then, a party has several distinct grounds of defense to the same cause of action, he must state each one separately, and in such a form that each statement will constitute a perfect bar to the suit; and he can not, as heretofore, by giving in his answer a history of the case, propound together all the defenses which the detailed facts of the case will justify. There were no objections to this kind of pleading in a case triable by the court; but there are insuperable ones in a case triable by a jury. Unless the code can receive a very liberal construction, answers in equity cases must be bound down to all the certainty, and point, and separation, of pleas at law; which will probably be found very inconvenient in practice. There is more difficulty in giving this construction to the language of the code which describes and limits the answer, than in that which describes the petition. Still it may be held, without absolute legislation, that each class of cases is to be stated according to its character, and that, on this ground, the nature of a case in equity requires the facts to be stated differently, in an answer, from what is

required in a case at law. Still it is very difficult thus to limit, or rather to extend, the language of the code, so as to permit an answer even in an equity case to be shaped in any other manner than in that in which pleadings at law are required to be shaped. The learned codifiers have followed the language of a court of law in defining an answer, instead of that of a court of equity. If such is to be the construction given to the code, then the court in a case in equity must respond to all the issues made, as distinctly as the verdict of a jury to the issues in a case at law. Otherwise parties will be concluded by facts which were never found against them. Several pleas are interposed to a case in equity; a general finding for the defendant would be a finding that all these separate defenses had been proved, when in point of fact only a single one of them might have been proved; and these issues thus found on the record might conclude the parties in subsequent suits: because a matter once distinctly put in issue, and found, concludes the parties by estoppel in any other suit where the same matter is put in issue. Dame *v.* Wingate, 12 N. H. 291; Arnold *v.* Arnold, 17 Pick. 9; Nash Digest, 316, sec. 15; 9 W. L. J. 11. Hence the court must in every case pass directly on each issue made, affirming or negativing it as the proof may require. There is no other safe course for either the parties or the court. Otherwise the court will be finding falsehoods, and the parties be concluded in their rights without knowing it. It would therefore appear reasonable, when a party went into new matter, in an answer to a case in equity, that he should be permitted to state the whole of his new matter together, since the whole of it constitutes a defense. Still it is a matter involved in doubt, and parties must frame their pleadings in view of this uncertainty.

The Number of Defenses, and inconsistent ones.

The code provides that the defendant may set forth as many defenses, counter-claims, and set-offs, as he may have. In this language there is no limitation on the right of the defendant in setting up his defenses, whether they are consistent or inconsistent. In Lansingh *v.* Parker et al., 9 Pr. 288, it was held that pleas which were not inconsistent under the former practice of the courts will not be held inconsistent as answers under the code. Hence the following defenses were held to be well joined in a case for an assault and battery: 1. General denial; 2. That plaintiff committed the first assault, etc.; 3. That plaintiff was at defendant's inn, making great noise, etc.; was requested to leave, and

refusing, the defendant laid hands gently on him to remove him, etc. A contrary opinion had been expressed by Crippen, J., in Roe *v.* Rogers, 8 Pr. 356. In Stiles *v.* Comstock, 9 Pr. 48, the same doctrine was maintained as in the first case—that the code did not limit the defendant to consistent answers. Such, too, is the plain language of the code; and yet the provision, which requires all pleading to be sworn to, practically deprives him of this plain right, because he can not make oath to inconsistent defenses without swearing two ways at once. A plea of not guilty and a justification to an action of trespass can not both be true. If there was no trespass, then there is nothing to justify. And yet in many cases both of these pleas may be absolutely necessary to the full protection of the rights of a defendant.

In equity a defendant might set up by answer as many defenses as he might have; but not inconsistent defenses. In a verified answer it was held that he could not set up two defenses that could not both be true in fact. 11 Paige C. 46; Ib. 49. Where the defenses, however, both or all of them, may be true, though entirely different in their nature, they are not inconsistent. Thus, in Buddington *v.* Davis, 6 Pr. 401, it was said that the defendant might deny all the allegations of the complaint (being for libel), and then, by a separate statement in the answer, allege the truth of the publication; and then again aver, by another plea, that the publication was privileged. *All* these several defenses might be true, and proof of one would defeat the action. But in an action for trespass, if the defendant should deny that he committed the trespass, and allege matter in avoidance, as a former recovery for the same trespass, it is manifest that both can not be true, and the latter is utterly inconsistent with the former. Van Santvoord's Pl. 286.

Inconsistent pleas in an answer will, of course, be stricken out on motion, or the defendant compelled to elect on which one he will rest his case.

It will thus be seen that, while in one section it grants the defendant a right to make any and all defenses, yet in another section it limits such several defenses to those that are not inconsistent. The effect of this state of the law is to obstruct parties in making their defenses, and to compel them in all doubtful cases to select between several doubtful and inconsistent defenses; and it may turn out on the trial that he has omitted the only one the jury would have found for him.

Sham Answers.

Where answers are sworn to, there can be no such thing as a *sham* answer. An answer, to be a sham one, must set up new matter; and such new matter, being known to be false, constitutes the plea or answer a *sham* plea or answer. When sworn to, it is to be taken as true; and the only objection that can then lie to it is its legal insufficiency as a defense, counter-claim, or set-off. Bennedict *v.* Tanner, 10 Pr. 455; Sherman *v.* Bushnell, 7 Ib. 171.

The object of a sham answer was by setting up new matter, requiring a reply, to secure a default, and in that way a continuance. Payment or fraud in obtaining a note might be plead, though wholly untrue, and though the party never expected to offer evidence under them for the mere purpose of delay; hence, on motion the court would strike it out as a fraud on the practice of the court. This delay may be obtained now if the docket is so crowded that all issues can not be tried at the term; hence, there may be a motive for getting up a sham answer, as a mere trick to secure delay. The court has still the power to strike it out in a case where the falsehood or immateriality of the answer is apparent. In The People *v.* McCormick, 18 N. Y. 315, the court held that an answer denying a material allegation in the petition might be stricken out as sham, although duly verified; and that an answer, the falsity of which is apparent, is sham, irrespective of its form as affirmative or negative, or its scope as assuming to put in issue the whole or a part of the material allegations in the petition; and that a motion to strike out one of several defenses as sham may be united with an application for judgment on account of the frivolousness of the other defenses. Strong, J., says: "A defense is sham in the legal meaning of that term, which is so clearly false in fact that it does not in reality involve any matter of substantial litigation. The chief characteristic of a sham defense is its undoubted falsity. Such a mere formal defense is sometimes designated as a false defense. The words 'sham or false,' applied to such a defense, signify the same thing. . . . The defense may be entirely clear in form, but nevertheless sham, for the sole reason that it is false. Brewster *v.* Bostwick, 6 Cowen, 34; Oakley *v.* Devoe, 12 Wend. 196; Broome County Bank *v.* Lewis, 18 Wend. 565. Irrelevancy in an answer, in analogy to impertinence in an answer in chancery, under our former judicial system, may consist in statements which are not material to the decision of the case; such as do not form or tender any material issue. Woods *v.* Morrell, 1 Johns. Ch. 103.

"But it is strenuously contended that a defense merely controverting a material allegation in the complaint can not be sham, and the practice of the Supreme Court on the subject of sham defenses, under the former system of pleading and practice, is confidently referred to in support of the position. Before the code that court possessed, as a part of its common-law powers, a supervision and control over the forms of pleading to prevent the perversion and abuse of those forms to purposes of mere delay and injustice. This authority was often exercised from the earliest period in striking out false or sham pleas, and scandalous, irrelevant, and redundant matter; and in pursuance of that authority, the general rule above referred to was adopted and extensively applied in practice. It was not, however, deemed proper by the court, before or after the adoption of that general rule, to go so far in the exercise of that power as to strike out the general issue; and hence it was established, as an exception to the doctrine in reference to striking out pleas as false or sham, that the general issue would not be stricken out for such a cause. This exception was entirely a matter of sound legal discretion in the court; it did not arise from a want of power to strike out the general issue in like manner as any other plea, when it was sought to make it an instrument of mere wrong and vexation, nor did it spring from the idea that the general issue was not capable of the essential elements and features of a sham pleading. The wisdom of this exception is not very apparent; and I can perceive no good reason for it beyond the difficulty in most cases from the comprehensive scope of the general issue in establishing satisfactorily its falsity. That plea, under the old system, was generally not only a denial in a short form of all that was material in the declaration, thereby putting the plaintiff to the proof of his cause of action, but it included many affirmative defenses which were admissible in evidence under it. The reason sometimes stated for the exception was, that the defendant had a right to put the plaintiff to the proof of his cause of action in all cases, whether the former had any defense or not. Broome County Bank *v.* Lewis, 18 Wend. 565; Mier *v.* Cortledge, 8 Barb. 75. But I know of no better right to obstruct the plaintiff in the enforcement of an honest demand, to which there is no defense by the general issue, than by a special plea. The former might be—as easily at least as the latter, and was oftener in practice—made the means of dishonestly postponing the collection of a just demand, and thereby working injury to a plaintiff. The evil of false pleas of the general issue was severely felt, and remedies were attempted—as by requiring

an affidavit of merits to prevent a cause being moved out of its order on the calendar at the circuit or an inquest; and by the act of 1840 providing for a verification of pleas in certain cases, and the rules of the Supreme Court thereon. 22 Wend. 644. It was doubtless the delay, expense, and injustice to which this plea of the general issue was so frequently perverted, which contributed as much as any other single cause to the new system of pleading and practice introduced by the code.

"Whatever may have been the reason, under the old system for limiting the exercise of the power to strike out false or sham pleas, to those presenting affirmative defenses, it has no application under the new to defenses in denial of the complaint, or of the material portions of it, or denying any knowledge or information thereof sufficient to form a belief. Such denials simply put in issue the allegations to which they relate; and they may be false or sham, and abused for improper purposes, as well as a defense of any other character. One leading policy of the new system is to suppress falsehood and secure truth in the pleadings; and for that purpose, among others, all the forms of pleadings theretofore existing are abolished and other simple forms prescribed. For the same purpose provision is made whereby a plaintiff, by verifying his complaint by affidavit, may require a similar verification of the answer of the defendant. Allegations not controverted are to be taken as true, and an ample remedy is afforded for a departure from the truth in an answer, by providing that *sham* and *irrelevant* answers and defenses may be stricken out on motion, and upon such terms as the court in their discretion impose. A limitation of this section by the courts to affirmative answers and defenses would, to a great extent, frustrate the policy referred to, and allow of great abuses in pleading, and improper and injurious delays of justice.

"It is further objected that the answer being duly verified, it is erroneous to strike out the first defense as sham; but the code makes no distinction, on the subject of striking out, between answers which are, and those which are not verified, and there is none in principle. If an answer clearly appears to be sham, the spirit of the code in relation to pleadings requires it should be stricken out, notwithstanding it has been verified in the usual form. Cases may, and do frequently arise where the proof of the falsity of a verified answer is so strong, that the answer should not be allowed to stand without a special affidavit stating the particular matters relied on to support it.

"Another objection to the order in respect to the first defense, is that the defendant was entitled to have the material issues formed by that defense tried by a jury, and that it could not lawfully be tried, against his consent, on *ex parte* affidavits. This objection, if available in this case, might equally be made to orders striking out affirmative defenses forming material issues, and would be fatal to the section above mentioned of the code, and the entire practice as to striking out false or sham answers. The true answer to the objection is that the right of the defendant to a trial by jury depended upon there being a real issue to be tried; that the court had power to determine whether there was such an issue, or whether the apparent issue was fictitious and sham, not to try the issue if there was not one in truth as well as in form; and that the order decides, on most satisfactory proof supporting it, that the defense was destitute of truth and substance, and presented no real issue. Such an authority over the pleadings is of the same nature with the power to require a verification of the pleadings as a condition of their admissibility. If the court may refuse to allow an answer, unless first verified, it may strike out an answer after it has been made, unless the defendant will verify it. So it may, on apparent proof of the falsity of a verified answer, strike it out, unless further verified in a more special and particular manner. The exercise of this power, in either case, is not a trial of an issue; no more so in one case than in the other. It is an indispensable power to the protection and maintenance of the character of the court and the proper administration of justice.

"This power should be carefully exercised, and not extended beyond its just limits, as above mentioned. It is a power simply to inquire whether there is in fact any question to be tried, and, if there is not—but the defense is a plain fiction,—to strike out the fictitious defense."

The above is a full discussion of sham pleading under the code. The expression above in the former edition, that a sworn answer will not be stricken out as sham, is mere opinion as to the practice; but if a sham answer is put in under oath, there is no doubt of the power of the court to strike it out on motion. The code requires all answers to be sworn to, and yet provides for striking them out if they are sham and false. If the sham character is made out clearly, perjury can be no reason for refusing to strike it out.

In the cases of Wayland *v.* Tysen, 45 N. Y. 281, and Thompson *v.* Erie Railroad Co., Ib. 468, the new Court of Appeals have so far modified the above opinion of Strong, J., in the above case of

People *v.* McComler, as to hold that the court has no power to strike out a sham answer consisting of a general denial. The court say: "The motion to strike it out was made upon affidavits tending to show its falsity; and the court, arriving at this conclusion, made the order striking it out as sham. The code (sec. 152) provides that sham and irrelevant answers and defenses may be stricken out on motion, and upon such terms as the court may in their discretion impose. This answer is the equivalent of, and substitute for the general issue under the common-law system of pleading. It gives to the defendant the same right to require the plaintiff to establish by proof all the material facts necessary to show his right to a recovery as was given by that plea. Under the common-law system, the general issue could not be struck out as sham, although shown by affidavits to be false. Broome Co. Bank *v.* Lewis, 18 Wend. 565. This was not upon the ground that a false plea was not sham. That was always so regarded, but upon the ground that a party making a demand against another through legal proceedings was required to show his right by common-law evidence, and that *ex parte* affidavits were not such evidence."

This reasoning is not satisfactory. The defendant, under the code, has no more right to put in a false general denial than he has of an answer containing new matter which is false. The object of the code is, that the issues to be tried shall be real issues, involving an honest contention between the parties. Under the old practice, where the parties were not under oath, they were permitted to put in any answer, and the rule then was that the defendant had the right to compel the plaintiff to prove his case. But is such the policy of the code? By no means. Its policy is to exclude all *false* issues, and compel the parties to be at the expense of trying what is really and *bona fide* a contention between them—"What right has the defendant now to put the plaintiff to a proof of his case, when he knows that the petition is true? And because a dishonest defendant shall interpose a false denial, is he to be permitted to have it stand, and put the plaintiff to the proof of his case, when it is made clearly to appear to the court that the denial is false and sham?" The argument, that on such a denial the party is entitled to a trial by jury, is sophistical; for he has no more right to try the truth of a general denial by a jury than he has an answer setting up new matter, which is in form a defense. If the falsehood of the one must be tried by the court, so must the other. But on a motion, its truth is not the contest,—it

is whether the party pleading has any reason to justify him in putting in a general denial or pleading new matter. If it is boldly false in the one case or the other, it ought to be stricken out. He has no right to compel the plaintiff to prove his case, when he knows that case to be true. The new matter and a denial are both put in under the sanction of an oath; and if that fact is to weigh in the matter, it applies to the new matter as well as to a denial. Nor can a party in the one case, more than in the other, put the plaintiff to the expense of a trial by perjury. The expense in a commercial transaction of making out a case is often very great, and, under the code, he is not to be put to that expense, unless the defendant has, or honestly believes he has, a *bona fide* defense, to be made by a denial or the statement of new matter. In either case, the oath of the party is set aside, and the court inquire whether in *fact* the defendant has any reason to make the one defense or the other. There is much greater objection to a false denial than to new matter which is false, because the latter admits the plaintiff's case as made in his petition, and puts the defense on a single point, where the burden of proof rests upon the party pleading it. There is then a much stronger reason for striking out a false general denial than there is for striking out new matter which is false. In my opinion, therefore, the reasoning of Strong, J., is much more convincing than that in the later cases. Our code requires all pleadings to be sworn to, which is not now the case in New York.

The fact that an answer is insufficient in form or substance, does not necessarily determine that it is frivolous. That only may be regarded as frivolous which is made to appear so incontrovertibly by a bare statement of it, and without argument. If an argument is required to show that the pleading is bad, it is not frivolous. Young *v.* Kent, 46 N. Y. 672.

Matter in Abatement.

Matter in abatement, as understood under the former system of pleading, may now be joined with matter in bar. It may be remarked that unless matter in abatement constitutes a defense, there is no authority for pleading it. The only authority for pleading any matter other than denial, is that it is new matter constituting a defense. There is no authority for but one answer, and the authority to set forth in that answer all the defenses the defendant has, is clear and explicit. Per Marvin, P. J., in Mahew *v.* Robinson, 10 Pr. 162.

Miscellaneous Matter.

SEC. 125. This section provides that in actions for libel or slander, the defendant may allege the truth of the matter charged as defamatory, and may prove the same, and any mitigating circumstances, or either.

This is another of those provisions introduced into the New York code to get rid of some absurd decision of their late court for the correction of errors. In Root *v.* King, 7 Cowen, 613, it had been held that where a defendant pleaded a justification in libel or slander, and failed on the trial to sustain it, he could not then go into evidence tending to mitigate the damages. This absurd decision has never been followed, we believe, elsewhere. In Ohio, the law is well settled that evidence in mitigation may be received as well where there is, as where there is not, a plea of justification. De Witt *v.* Greenfield, 5 Ohio, 225. Hence this section has no application to our law, unless it is to make it infinitely worse. Does the section have the effect of precluding such evidence, unless it is stated on the record? It is presumed not, since its terms are not mandatory, but permissive. A pleader may spread on the record his facts in mitigation; if he has, however, the folly to do it, he can not on the trial prove any fact not embraced in his statement.

An answer setting up a justification in libel or slander, must confess the speaking of the words. Annibal *v.* Hunter, 6 Pr. 255; 1 Code, N. S. 403; Sayles *v.* Woden, 6 Pr. 84; Buddington *v.* Davis, 6 Pr. 401; Porter *v.* McCready, 1 Code, N. S. 88; Lewis *v.* Kendall, 6 Pr. 59.

An answer merely stating that the words spoken are true, is insufficient as a justification; it should state the facts which go to constitute the crime or offense imputed, so that an issue either of law or fact may be framed; or as it is better expressed in Fry *v.* Bennet, 1 Code, N. S. 255, where an alleged libel consists of a charge general in its character, a justification on the ground of the truth of the charge must state the facts which show the charge to be true. In Annibal *v.* Hunter, 6 Pr. 255, Willard, J., says: "I am aware that the schedule of forms annexed to the first report of the commissioners on practice and pleading, gives countenance to such an answer as the present. These forms were never adopted by the legislature; and the one for a justification in libel or slander is utterly inconsistent with the code. The code requires that

an answer shall contain, in respect to each allegation of the complaint controverted by the defendant, a general or specific denial thereof, or a statement of any new matter constituting a defense. In this case the defendant does not deny the speaking of the words, but says they are true. In other words, he charges the plaintiff with the crime of perjury. His answer should contain a statement of the facts which constitutes that crime. The plaintiff is well entitled to reply, controverting those facts, and thus have an issue framed which can be tried. This answer, as drawn, states no facts, nor times, nor circumstances when and where the alleged perjury was committed. In anonymous libel (3 Pr. 406), an answer like this was overruled as bad. The same question has repeatedly been decided in the same way. *Vide* also 7 Pr. 227; 9 Ib. 282; 10 Ib. 79. These cases settle that, under the code, the law of pleading is, in Ohio, just what it was before, and that this section has here no effect whatever.

This section is somewhat discussed in the case of Wachter *v.* Quenser, 29 N. Y. 547. The present doctrine is this, says Denio, C. J., in this case: The defendant may set up a justification, or he may allege facts short of full justification, but giving some color to the charge, by way of modification, or he may do both; and in either case he may prove the facts as they are, though they fall short of a justification; and the jury may take them into consideration for the purpose of mitigating the damages. Bush *v.* Brosser, 1 Kern. 347; Bisbey *v.* Show, 2 Kern. 57. This rule, however, has no reference to the practice in Ohio. It is here decided that in an action for slander for calling the plaintiff a thief, the defendant might give in evidence in mitigation of damages that the plaintiff had driven away from one W. a flock of geese belonging to said W. Wilson *v.* Apple, 3 Ohio, 270. Circumstances tending to lead one to suspect or believe the plaintiff guilty of the crime charged may be received in mitigation of damage. No statement of mitigating circumstance need be stated on the record, and the courts, since the code, have ruled in accordance with the prior decision. Haywood *v.* Foster, 16 Ohio, 88. Prior charges, uttered more than a year before suit, may be offered in evidence to show malice, though not set out in the petition. Stearns *v.* Cox, 17 Ohio, 590. So matters not capable of supporting an action, or constituting a justification, may be given in evidence in aggravation, or mitigation of damages, as there is no other mode of bringing it before the court and jury. Fisher *v.* Patterson, 14 Ohio, 418, 424. All this evidence is in Ohio admissible under a plea of not guilty, on

an inquiry of damages, on a trial on a plea of justification, if the party fails in his proof of the plea of justification.

This case of Wachter *v.* Quenser, 29 N. Y. 547, also decides that a plea of justification is not altered by the code, but must state the facts constituting the justification as definitely and specially as would be required in an indictment, if the justification involves a charge of crime. "Mr. Chitty," says Denio, C. J., "states the rule very accurately in saying that the defendant, in this class of actions, must justify by stating the particular facts which evince the truth of the imputation, and that the rule holds whether the imputation upon the plaintiff's character be of a general or specific nature. He adds that this is necessary, although the libel contain a general imputation upon the plaintiff's character, that the plea should state specific facts showing in what particular instance, and in what exact manner, he has misconducted himself. 1 Chitty on Pl. 494, 495. I do not conceive that the substance of this rule is abolished by the code. In respect to new matter in an answer, the direction is only that it must be in ordinary and concise language, without repetition. This certainly does not allow a reiteration of the libelous words, and an averment that they are true, without the statement of a single fact showing them to be so. Take, for instance, a charge that one is a thief or a murderer, or that he has committed perjury. A statement in the answer that the words are true would not be a justification, and it would fall just as far short of being a statement of facts to be proved by way of mitigation. It is a statement of nothing; it is simply a repetition of the libel. Such is the precise character of the answer in this case, so far as it is to meet the imputation of borrowing and running away. It does not furnish the slightest clue to the case which the defendant intends to prove on the trial. The provision of the section of the code just referred to is that the answer (in slander and libel) may allege both the truth of the matter charged as defamatory, and any mitigating circumstances. This certainly does not mean that it may be alleged in general terms, without any statement of facts or particular circumstances. The requirement that the answer should set up the matter to be relied on was intended to prevent surprise, by informing the plaintiff of what he must expect to meet." It will thus be seen that this section has not changed the law in relation to pleas of justification in actions for libel or slander. There are certain words which imply many acts to constitute the charge, as "whore," and the like; a plea of justification averring that she is

a whore, as new matter may be good, as it implies evidence of various acts to prove the truth of the charge. A woman is not necessarily a whore because she has a bastard child, or because she has been guilty of an act of incontinence. It implies much; it implies a woman who makes a business of selling her person out to every comer for money. This is a state of case where the facts tend to multiplicity, and where general pleading is allowable. It was allowable to aver that a woman was a common scold, because the facts to make out the case were many and multiplied. The Supreme Court in Indiana, overlooking this distinction, held that to a charge of being a whore, it was a good plea to say she had had a bastard child by a certain person. This act did not make a whore by any straining of language, nor by any definition of the word in any dictionary. I believe, therefore, that a general plea in such a case is allowable. Alcorn *v.* Hooker, 7 Blackf. 68. If a plea is to be more specific, it must state several acts of incontinence like the form in another part of this work. Still it seems to me a proper case for general pleading, as the rule is stated in the review of the case of Saunders *v.* Stotts, 6 Ohio, 297; 2 West. Law Jour. 297.

Sec. 120. This section also has no meaning in Ohio. It never was necessary here to set out facts to show jurisdiction. Our courts are courts of general jurisdiction, of the organization and jurisdiction of which the courts will take notice. No one has deemed it necessary, in counting on the judgment of a mayor, to set forth that both parties were resident of the jurisdiction. If the party was served, then he is concluded by the judgment; if he was not served, then, of course, the judgment is void. We presume, therefore, that this section will be treated as a nullity in Ohio, where the law never required any more than this section of the code requires.

Sec. 117. This section provides for filing copies in actions founded on an account, note, bill, or other written instrument, as evidence of indebtedness. This section does not apply to actions founded on principles of equity, as action on note and mortgage; nor does it apply to all common-law actions. Where the action sounds in damages, as in covenant, etc., no copy need be filed. A copy is only necessary in cases where the plaintiff demands judgment for sum certain, with interest from a fixed time. Such was the decision of District Court, in Scioto county, at its May term, 1858.

CHAPTER XIII.

REPLY.

1. The plaintiff may demur or reply to the answer of the defendant.

2. Sec. 101. The plaintiff may demur to one or more defenses set up in the answer, stating in his demurrer the grounds thereof; and where the answer contains new matter, the plaintiff may reply to such new matter, denying, generally or specifically, each allegation controverted by him; and he may allege, in ordinary and concise language, and without repetition, any new matter not inconsistent with the petition, constituting an answer in law to such new matter. To this reply the defendant may demur.

3. Sec. 127 Every material allegation of the petition not controverted by the answer, and every material allegation of new matter contained in the answer not controverted by the reply, shall, for the purposes of the action, be taken as true; but the allegation of new matter in the reply shall be deemed controverted by the adverse party, as upon a direct denial or avoidance. Allegations of value, or of amount of damage, shall not be considered as true by failure to controvert them.

It will be seen that the code has been essentially changed in reference to the reply since the publication of the first edition of this work. Several disputed propositions there discussed are by this change resolved in conformity to suggestions there submitted. It was there denied that a defendant could demur to new matter in the answer; but I then claimed that a fair interpretation of sections 101 and 102 of the code allowed the defendant to test the legal sufficiency of the new matter on a demurrer. The present section, as above cited, now expressly authorizes such demurrer, and so resolves all doubt. I also suggested certain difficulties to which parties might be subjected by reason of requiring no reply to an answer, and setting up new matter by way of defense. This section changes the original code, and requires an answer setting up new matter, to be replied to either by a general or special de-

nial, or by the statement of new matter, which in law shall constitute an answer to this defense. To this reply, no other rejoinder than a demurrer can be interposed by the defendant.

The code, as it now stands, allows the plaintiff: 1. To demur to the answer, whether the same consists of new matter, constituting a defense, or counter-claim, or set-off; 2. Requires him to generally or specially deny the material allegations contained in the answer, whether the same be new matter constituting a defense, or a counter-claim, or set-off; or, 3. To set up such new facts as in law will be an answer or bar to the new matter, counter-claim, or set-off. We will speak of each of these in their order.

I. *Demurrer to Answer.*

The plaintiff can now test, by demurrer, the legal sufficiency of any new matter set up as defense, as well as that of a counter-claim or set-off. The nature and form of this demurrer will be the same as a demurrer to a petition, and should point out the particular objection which the pleader brings against the matter demurred to. The only substantial grounds for a demurrer must be that the new matter set up is not sufficient in law to bar the plaintiff's right to recover. Where the demurrer is interposed to a counter-claim or set-off, the reason alleged must be that the answer does not state facts sufficient to constitute a cause of action. A counter-claim or set-off must state all the facts necessary to show that the defendant has a right of action against the plaintiff, and the right to set it up in that particular action. If the answer does not show that the counter-claim is in law connected with the same transaction out of which arises the plaintiff's cause of action, it is bad, and must be ruled out on demurrer. The same is true of a set-off. Where the plaintiff's claim has come to him by assignment, the answer must set forth all the facts necessary to show a right in the defendant to set up his counter-claim or set-off against the assignee, the plaintiff in the action. Unless it does this, the answer is defective, and must be ruled out on demurrer.

In the case of The People *v.* Booth et al., 32, N. Y. 397, the court held that on a demurrer to the answer for insufficiency, the defendants may attack the petition on the ground that it does not state facts sufficient to constitute a cause of action. Davis, J., says: "That on demurrer to an answer for insufficiency, the defendants are at liberty to attack the complaint on the ground that it does not state facts sufficient to constitute a cause of action. 8 How. 261; 12 Barb. 573; Code, secs. 144, 148."

In the case of Shroyer *v.* Richmond, 1 Ohio St. 455, the court held that upon a general demurrer to an answer containing several distinct grounds of defense, the demurrer must be overruled, if any one of the defenses is in law sufficient to bar the plaintiff's action. It will be seen that the same rule applies to an answer containing more than one defense, and to a reply that applies to a petition containing several causes of action; if the demurrer is general to the whole petition, answer, or reply, and any one of the causes of action, or defenses, or replies, is good, the demurrer fails, and must be overruled; hence it is necessary as a matter of precaution to demur to each count of the petition, or answer, or reply separately, so that it may be sustained to those counts which are bad, while it may be overruled as to those which are good. This may be done by a separate and distinct demurrer to each count in petition, answer, or reply, or probably by a demurrer *single* in form but *several* in substance. The form will be somewhat like the following: "And now comes the said defendant and demurs *severally* to each of the counts in the said petition, answer, or reply, and for reasons of demurrer states," etc. The cause to each count may be stated, if the same does not apply to all; or if the same reason applies to all, then the ground may be stated that neither of said counts contains facts sufficient to constitute a cause of action, or to bar the plaintiff's right of action, or to avoid the answer of said defendant, and show a cause of action in the plaintiff. I can see no objection to this form of a several demurrer, and it renders the pleadings briefer, when there are several counts in the petition, answer, or reply. It has been sanctioned in practice. S. P., Hale *v.* O. Nat. Bank, 49 N. Y. 626.

1. *Demurrer to New Matter.*

A B, Plaintiff,
vs.
C D, Defendant,
} Demurrer.

And now comes the said A B, plaintiff, and says that the several matters set up in the answer (or in the first count or second count of the answer) of the said C D, defendant, are not sufficient in law to bar the action of the said plaintiff; whereupon he prays judgment.

G H, Attorney for plaintiff.

2. *Demurrer to Counter-claim or Set-off.*

And now comes the said A B, plaintiff, and says that the answer (or the first, second, etc., count of the answer) of the said C D, defend-

ant, does not state facts sufficient to constitute a cause of action in favor of said defendant and against said plaintiff; wherefore he prays judgment.

The demurrer to a *reply* may be in the following form:

3. *Demurrer to a Reply.*

And now comes the said C D, defendant, and says that the several matters set up by the said A B, plaintiff, in his reply, are not in law sufficient to enable him, the said plaintiff, to maintain his aforesaid action against this defendant; wherefore the said defendant prays judgment.

II. *Reply to New Matter in the Answer.*

The answer of new matter is now to be taken as admitted, unless denied; and hence must be met with a denial, or with a reply setting up new matter by way of avoidance.

This change in the code, so far as common-law actions are concerned, restores the course of pleadings as they were at common law.

Denials.—Nothing need be added to what has already been said, under the head of *Answer*, as the nature and form of a denial in a reply. It may be either general—a denial of all the facts set up in the answer—or special—a denial of some one material allegation contained in the answer.

1. *General Denial to Answer, setting up Matter of Defense.*

And now comes the said A B, plaintiff, and says that he ought not to be barred of his said action, because he saith that the several matters set up in said answer of said C D, defendant, are not true as therein set forth.

Or as follows: Because he saith that he denies the truth of all and singular the averments contained in the answer (or first, second, etc., count of the answer) of the said C D, defendant.

2. *Special Denial.*

A special denial must of course contain a negation of some material averment in the answer; and hence its form is simply a denial of the averment substantially in its words. Its form will be like the above to the words *because he saith*, and will then proceed as follows: *that the said defendant did not pay said sum of , as he hath in his said answer alleged; that the said plaintiff had not notice of the existence of said defense now set up in said answer at the*

time of the transfer of said note, or account, etc., by the said to the said plaintiff, etc. What has been said as to special denials, under the head of *Answer*, is strictly applicable to such denials in a reply; hence it is unnecessary to enlarge upon their nature here.

III. *Reply of New Matter—Constituting a Defense.*

As the defense set up in the answer, unless it can be denied, is to be taken as true, the plaintiff must set new matter by way of avoidance. This is a return to the course of common-law pleading, and whatever was a good reply under the law of pleading, as then understood, is a good reply now under the code.

The reply must, in the first place, not be inconsistent with the petition; or in common-law language, it must not be a departure from the cause of action set up in the petition; it must uphold the cause of action, must show a right to recover on that cause of action. A departure in pleading is the dereliction of an antecedent ground of complaint for a new one, and not fortifying the former. Gould's Pl. 453. It is the allegation of new matter not tending to fortify traversed matter. Paine *v.* Fox, 16 Mass. 129; Darling *v.* Chapman, 14 Ib. 101; Holey *v.* M'Pherson, 3 Heernysh, 104; M'Aden *v.* Gibson, 5 Alol. 341; Kilgore *v.* Powers, 5 Blackf. 22; Yeatman *v.* Cullen, 5 Blackf. 240. The following cases in Ohio refer to this subject of replication: Richmond *v.* Patterson, 3 Ohio, 368. Double replications are bad on demurrer. Several replications may be filed. Colter *v.* Doty, 5 Ohio, 593. The replication of *de injuria* to a plea of justification in trespass will put in issue only the authority set up in the plea. If the party relies upon a new trespass, excess of authority, excessive beating, etc., he must reply the fact specially. Parish *v.* Rigdon, 12 Ohio, 191. Where the statute of limitations is pleaded, a new promise can not be replied; the petition must be founded on the new promise. Hill *v.* Henry, 17 Ohio, 9; Drouillard *v.* White, 10 W. L. J. 385.

Matters in *estoppel* may be replied. 3 East, 348; 1 Saund. 257; 6 Term. 62; 2 Johns. 24; 4 Day, 431; 5 N. H. 393; 17 Pick. 9; 12 N. H. 291; 18 Pick. 564; 8 Blackf. 175; 4Gill & Johns. 345. So to a plea of infancy, the plaintiff may reply that the goods were necessaries, or a new promise after coming of age. 3 Chit. Pl. 1146; 1 M. & S. 724; 3 Ib. 480; 2 B. & C. 826. So to a plea of tender, plaintiff may reply a demand and refusal after tender made. 5 Barn & Ald. 630; 3 Chit. Pl. 1155. To a plea of release, that it was obtained by fraud or duress. 3 Chit. Pl. 1158. To a plea of

license, a countermand. 3 Chit. Pl. 1209; 11 East, 451. To a plea of escape though a defect of fences, that defendant turned cattle in, that defendant's cattle are unruly, etc. 3 Chit. Pl. 1209. To a justification under process, a new assignment of an imprisonment before issuing of process. 3 Chit. Pl. 1214. To a plea justifying removal of cart, etc., under a right of way, new assignment *extra viam.* 10 East, 73; 3 Chit. Pl. 1215. There can probably now be no new assignment in trespass to real estate, since the petition ought to identify the *locus in quo.* To a plea of a right of way, plaintiff may reply unnecessary damage, or that defendant went beyond the boundaries of the way. 3 Chit. Pl. 1217. There are of course numerous other matters, which may be set up to avoid the effect of a bar contained in an answer; what these are must be determined from the facts of each case and from the law governing the case. The forms found in 3 Chit. Pl. render it unnecessary to insert any in this work.

The language of our code is slightly different from that of New York; and for us, these questions must be settled by the language of our own code. As preliminary it may be well to remark that, unless the method of testing the sufficiency of a defense is justified by the code, there is no way provided by which it can be done. Section 118 provides for striking out on motion *redundant* or *irrelevant* matter from any pleading. This language does not look to striking out an *answer*, as it must if the answer contains but one defense. The *answer* would in that case have to be stricken out, and not the *redundant* or *irrelevant* matter contained in it. These words both imply that the plea or answer, or the statement of any matter, is more prolix than is necessary; that it contains language which only serves to incumber the record and increase its length. This section applies as well to petitions as to answers; hence, if the one plea of an answer can be stricken out for *insufficiency*, then can also a count in the petition. But this can not be done as to a petition, as the code expressly provides that such an objection can only be taken by demurrer. This shows what meaning the codifiers attached to these words, *redundant* and *irrelevant*—that they meant a pleading, containing facts enough to make out a cause of action, or defense, but also containing other matters having nothing to do with a correct and brief statement of the cause of action, or matter constituting a defense; and that when this *redundant* or *irrelevant* matter was stricken out, there would still remain a sufficient cause of action, or new matter constituting a defense in law. This seems to us clearly the meaning and scope of this section 118;

and if it is so, then it gives no authority to the court to test in this way the legal sufficiency of a pleading, which does not in fact contain *redundant* or *irrelevant* matter. If the sufficiency of a count in a petition can not be so tested, how can the sufficiency of a statement of new matter in defense be so tested? If an insufficient count is not *redundant* or *irrelevant* matter, how can a plea or the statement of new matter in defense be so considered? The code does not, then, provide for raising this question on motion.

If it can not be raised by demurrer or on motion, there is but one other way it can be raised, and that is to move the court, on the trial, to reject all evidence under such a statement in an answer. And such is said to be the practice in New York; so that a party never knows of any legal objection to his defense till it is sprung upon him at the trial, and that, too, after all the costs of a trial have been incurred. That is certainly strange practice which requires the parties to incur the expense of a jury trial to raise a question already apparent on the record, and which question could have been settled on a demurrer with little or no expense to the parties, and under such circumstances that full consideration could be given to the question—which never can be done in the hurry of a jury trial.

The question as to what could be set up in a reply was before the court in the case of Durbin *v.* Fisk, 16 Ohio St. 533. The court say that "by his petition he asserts the mere legal rights of the holder of a promissory note. And if his replication could be regarded as seeking equitable relief under the facts there stated, it is a total departure from the petition. A plaintiff can recover only on the causes of action stated in his petition. It is not the province of a reply to introduce new causes of action. This can only be done by an amendment of the petition."

This case shows that a case can not in its progress be varied, or changed into another and different cause of action. The same reasoning applies to an answer; no more can the defendant set up a new cause of action against the plaintiff by way of defense, unless it can come in under the name of counter-claim or set-off. These are the only two causes of action which a defendant can set up in his favor against the plaintiff in an action; all else must be matter, which defeats the plaintiff's action. To an action to recover real estate, evidence showing that the plaintiff is entitled to the possession of the premises under a lease, or a contract of purchase, is evidence defeating the plaintiff's action, and driving him to an action on the lease, or contract of sale. So by this decision, the

plaintiff could not reply a right of action under the lease, contract, or other agreement; that would be a departure. And yet, if the defendant to a legal action can set up an equitable right of action, the plaintiff must be allowed to depart from his cause of action in the petition to meet the equitable cause of action set up by the defendant. No more can such matter come up as a counter-claim, because a counter-claim looks to a legal remedy in answer to a legal demand; if the action is one in equity, then no counter-claim is necessary, for all matters in such a case come in as an answer. This was the law under the old practice, and there is nothing in the code to change it.

Reply to Counter-claim and Set-off.

Little need be said on this head. The counter-claim and set-off are new suits, in which the answer takes the place of a petition, and the reply the place of an answer. Hence the plaintiff can, in his reply, set up any defense he could have set up in case suit had been instituted on the counter-claim or set-off. The rules, therefore, which govern the answer to the petition will govern the reply to the counter-claim and set-off. It was held, in Ranney *v.* Smith, 6 Pr. 420, that several claims might be included in a single count of set-off in the answer. "It is argued," says the judge, "that each note constitutes a defense to the extent it may reduce the plaintiff's demand, and that therefore each note should be stated in a separate statement of new matter in the answer. This does not follow. We are to have a regard to the nature of the defense; and here all the notes constitute a set-off. I am not now considering how these notes should be described or set out in the answer; but it is not objectionable to include all the set-off in the same *statement of new matter*. This was admissible in a plea under the system superseded, although a declaration formed in the same way would have been bad for duplicity. The general rule was, that in point of form, the plea of set-off should contain all the requisites essential to the validity of other pleas in bar. 1 Chit. Pl. 495; Barb. on Set-off, 79. Duplicity, however, in a plea of set-off, was not a cause of demurrer; in other words, a defendant was permitted to include in the plea any and all debts or demands which by law he was allowed to set off. . . . It was not objectionable to state in the same plea of set-off any number of debts or demands which the law allowed to be set off. Nor is there now any objection under the code." There can be no doubt that this is good law. The answer of set-off should begin by stating that the

plaintiff is indebted to the defendant in a certain amount, and proceed to set forth the several grounds of the set-off, and conclude by claiming judgment for so much, to be applied, as far as necessary, toward satisfying any demand the plaintiff may have against the defendant. Hence the reply must be framed to meet such a claim of set-off, and may be several to the several matters set up by way of set-off, if it is necessary for the defense of the plaintiff to the same.

In Miller *v.* Losee, 9 Pr. 356, it was held that where the defendant, in his answer, sets forth a cause of action arising on contract other than that which constitutes a set-off, the plaintiff may reply any facts which would have constituted a defense, had the defendant sued the plaintiff for such cause of action.

It was further held, in the same case, that the plaintiff to a set-off, set up by the defendant in his answer, might reply any other cause of action which he had against the defendant, and had not embraced in his petition, as a set-off to the defendant's set-off, if the claim was such as to be the subject of a set-off. This is pressing the doctrine of set-off to a very liberal extent; because, if the plaintiff may reply by a set-off, the defendant must be permitted to answer over to it, a thing for which the code has made no provision. And what should prevent the defendant from bringing forward a second item of set-off to meet this of the plaintiff? Whatever may be the construction of the New York code, we think ours will not permit it. By our code, the plaintiff may allege new matter constituting a *defense*. This word, as used in our code, never includes set-off or counter-claim. The plaintiff may deny generally or specially, and set up any new matter constituting a *defense*. This is the language applied to an answer, omitting the additional words *counter-claim or set-off*. The reply, therefore, must be limited to a denial of the facts stated in the set-off or counter-claim, or to such new matter as constitutes a defense to the claims set up, whether by way of set-off or counter-claim. And hence no new claim by way of set-off can be introduced by the plaintiff. The only remedy the plaintiff has is to include the matter in his petition, on leave obtained from the court, where the defendant's set-off has really been extinguished in equity by other claims of the plaintiff, not included in the plaintiff's petition. Unless this can be done, a plaintiff must be sure to include all his demands in his action, lest he be thrown out of court by a set-off which may be canceled by a claim he has not sued upon. We have known such an amendment allowed in an appeal case, where

the set-off was first set up in the Court of Common Pleas. Still it is doubtful whether such an amendment can be made.

On March 6, 1857 (54 Ohio L. 23), section 105 is amended by adding the following to it: "Any party may, in all cases in which he would have the right to use the deposition of an adverse party, whether plaintiff or defendant, also annex to his pleading, other than a demurrer, interrogatories pertinent to the case, which interrogatories, if not demurred to, shall be plainly and fully answered under oath. When annexed to the petition, they shall be answered within the time limited for answer to the petition; when annexed to the answer, they shall be answered within the time limited for a reply; when annexed to the reply, they shall be answered within the period allowed for answers to petitions, in general, but further time may be allowed in any case, by the court or judge, in vacation. Answers to interrogatories may be enforced by nonsuit, judgment by default, or by attachment, as the justice of the case may require. On the trial, such an answer may be used as evidence by either party."

This provision introduces the practice of seeking discovery in actions at law, as well as in suits in equity. The code at first ignored altogether the law of discovery, and substituted for it the examination of a party as a witness. These answers to interrogatories are substituted for a deposition when this course has been pursued. It declares that on the trial such answer may be used as evidence by either party. If this means that the party answering can use it as evidence, even to matters in his favor, which would not be competent if inserted in a deposition or given orally, then no prudent counsel would advise the filing of interrogatories, and it would only be setting a trap, to be sprung by his adversary against himself. The act of 17 and 18 Vict., c. 125, provides that a party may deliver "interrogatories in writing upon any matter as to which discovery may be sought." Lord Campbell, C. J., in Whateley *v.* Crowter, 5 E. & B. 709; S. C., 85 Eng. Com. Law, 709, uses the following language in reference to this matter: "What is the interpretation to be put upon that? I think it is too wide an interpretation to say, as seems to have been said by Alderson, B., in the case cited in the Exchequer (Osborne *v.* London Dock Co., 10 Exch. 698, 702), that every question may be asked on interrogatories which might be asked if the party was a witness at the trial. I think the interrogatories must be confined to matters which might be discovered by a bill of discovery in equity. I adopt the rule in the very terms used by Sir James Wigram (Wig-

ram on Discovery, 261), 'That the right of a plaintiff in equity to the benefit of the defendant's oath is limited to a discovery of such material facts as relate to the plaintiff's case, and does not extend to a discovery of the manner in which the defendant's case is to be established, or to evidence which relates exclusively to his case.' You may inquire into all that is material to your own case, though it should be in common with that of your adversary; but you may not inquire into what is *exclusively* his case." There are some other cases under the English act which illustrate the kind of questions which may be asked. Rew *v.* Hutchins, 10 C. B. (N. S.) 829; Zychlinski *v.* Maltby, 10 C. B. (N. S.) 838; Teysling *v.* Ward, 6 Hurlst. & N. 749; May *v.* Hawkins, 11 Exch. 510; Chester *v.* Wortley, 17 C. B. 410; S. C., 84 Eng. C. L. 410; Hollingham *v.* Head, 4 C. B. (N. S.), 388; S. C., 93 Eng. C. L. 388; Bird *v.* Malzy, 1 C. B. (N. S.), 308; S. C., 87 Eng. C. L. 308. The English rule is the reasonable one—that the party is confined to his own case, and has no right to interrogate the opposite party as to what his own case will be, when he may choose to present it. Such a construction of the statute would lead to great abuses. Parties would be inquiring as to the evidence of the opposite party, in order that he might obviate the effect of it, when it should be presented. Each party is to propound his interrogatories when he files his pleading: the plaintiff, with his petition or reply; the defendant, with his answer. The case, as it stands when the interrogatories are filed, is the case *pertinent* to which the discovery is sought. No evidence is pertinent to the case on filing the petition but the case made in the petition—but evidence supporting the case of the plaintiff. When the defendant files his answer, then the pertinency of the interrogatories will depend upon the nature of the answer, and interrogatories may be presented on the issue or issues then made. If it is a general denial, the discovery may be of evidence tending to disprove the case of the plaintiff and supporting the denial of the defendant. If new matter is set up, and a general or special denial is interposed, then the discovery is limited to the support of the case made by the new matter set up in the answer. So, on filing the reply, the plaintiff may interrogate the defendant as to the case as presented in the answer and reply. The plaintiff can not, in his reply, file interrogatories relating to his own case, as made in the petition. The interrogatories are to be filed with each pleading, and are to be pertinent to the case then presented; hence the discovery sought for by interrogatories filed with the reply must be limited to evi-

dence presented on the new issues made in the answer and reply. The answers, too, are to be filed on filing the next pleading, which shows that each set of interrogatories must be limited to the case made by the previous pleading. There can be no other rule which can limit the discovery to matter pertinent to the case. Before the defendant has filed his answer, no one can tell what will be pertinent to the issue he may make. To go beyond proof of the facts set forth in the petition, in the interrogatories filed with the petition, can not be pertinent to the case at that time; and the pertinency of the interrogatories must be settled by the case then presented on the record. This, of course, confines the discovery to the case then presented. Such seems to be the reasonable construction of the act, and the practice under it. This section was amended last winter (70 Ohio L. 54), extending it to corporations.

CHAPTER XIV.

VERIFICATION OF PLEADINGS.

SEC. 105. Every pleading in a court of record must be subscribed by the party or his attorney.

SEC. 106. That every pleading of fact must be verified by the affidavit of the party, his agent or attorney. When a corporation is a party, the verification may be made by an officer thereof, its agent or attorney; and when the State, or any officer thereof in its behalf is a party, the verification may be made by any person acquainted with the facts, the attorney prosecuting or defending the action, the prosecuting attorney, or attorney-general. A pleading, verified as herein required, shall not be used against a party in any criminal prosecution, or action or proceedings for a penalty or forfeiture, as proof of a fact admitted or alleged in such pleading, and such verification shall not make other or greater proof necessary on the side of the adverse party.

The act of April 6, 1859 (56 Ohio L. 240; 1 S. & C. 91, sec. 22), modifies this provision so far as relates to suits by the State. It is there provided (section 22 of the act prescribing the duties of attorney-general) that it shall not be necessary to verify the pleadings on the part of the State, or officer aforesaid, in any such action, suit,

or proceeding. The forepart of this section defines what is meant by the words *officer* and *action, suit, or proceeding*—"no undertaking or security shall be required on behalf of the State, or any officer thereof, in the prosecution or defense of any action, writ, or proceeding;" and then follows what is quoted above. The meaning of the whole section is, that in no action, writ, or proceeding prosecuted in the name of the State shall it be necessary to verify the pleadings, nor in any case where the action, writ, or proceeding is in the name of an officer of the State for the use of the State. The language is broad enough to justify a construction that no officer of the State need verify his pleading in a private case of his own. The legislature could never have intended such an absurdity, and hence, as the act relates to public business, it may be reasonably construed to relate only to that; and hence that the word "officer" is restricted to cases where he sues or defends for the State in his official capacity. It therefore relates to any officer, and hence may reach cases where a supervisor sues for a penalty under the road law, and to many other cases when an officer is authorized to sue on a public matter.

When a corporation is a party, the verification may be made by an officer thereof, its agent or attorney.

When the State, or any officer thereof in its behalf, is a party, the verification may be made by any person acquainted with the facts; the attorney prosecuting or defending the action, the prosecuting attorney, or the attorney-general.

A pleading thus verified shall not be used against a party in any criminal prosecution, or action, or proceeding for a penalty or forfeiture, as proof of a fact admitted or alleged in such pleading.

Such verification shall not make other or greater proof necessary on the side of the adverse party.

When not to be verified.

No verification shall be required to the answer of a guardian defending for an infant, or person of unsound mind, or a person imprisoned.

Nor in any case where the admission of the truth of a fact stated in the pleading might subject the party to a criminal or penal prosecution. Springstead *v.* Robinson, 8 Pr. 41.

How to be verified.

If there are several persons united in interest and pleading together, the affidavit may be made by any one of such parties.

The affidavit is sufficient, if it state that the affiant believes the facts stated in the pleading to be true.

NOTE.—The verification is no part of the pleading. George *v.* McAvoy, 1 Code, N. S. 318.

Where the several parties to a bill or note are sued in one action, and they make a *joint* answer, it must be verified by or on behalf of each defendant. Alfred *v.* Watkins, 1 Code, N. S. 343.

A defect in verification must be taken advantage of by motion to set aside the pleading for irregularity. Webb *v.* Clark, 2 Code, 16; Gilmore *v.* Hempstead, 4 Pr. 153.

Where the verification is made by attorney instead of the party, the reasons must be stated why it is not made by the party. Fitch *v.* Bigelow, 5 Pr. 237.

Where the defense is not founded upon a written instrument, for the payment of money only, in the possession of the attorney, he must have personal knowledge of all the material allegations of the answer, to enable him to verify it. Hunt *v.* Meacham, 6 Pr. 400.

When Affidavit may be made by Attorney.

SEC. 113. The affidavit, when made by the agent or attorney of the party, must show the reason why not made by the party, and it can be so made only in the following cases:

1. When the facts are within the personal knowledge of the agent or attorney.
2. When the plaintiff is an infant, or of unsound mind, or imprisoned.
3. When the pleading to be verified is founded upon a written instrument for the payment of money only, and such instrument is in the possession of the agent or attorney.
4. That the party is not a resident of the county.
5. That the party is now absent from the county.

NOTE.—A party may deny an averment if he has no knowledge of its truth. Treadwell *v.* Comm'rs, 11 Ohio St. 183.

Forms of Verification.

AFFIDAVIT TO A PETITION.

And the said A B (or, one of the plaintiffs), in the aforesaid action, being first duly sworn, deposeth and saith that the several matters and things set forth in the above petition are, according to the best of his knowledge, information, and belief, true in substance and in fact.

D B.

Subscribed in my presence, and sworn to before me, this day of , A. D. 18 .

AFFIDAVIT BY NEXT FRIEND.

And the said E F, the next friend of the said A B, plaintiff in the aforesaid action, being, etc. (*as in the last.*)

WHERE A CORPORATION IS A PARTY.

A B, being first duly sworn, deposeth and saith that he is the president (or cashier, or director, or agent, etc.) of the said , plaintiff in the aforesaid action, and that the several matters and things set forth in said petition are, according to the best of his knowledge, information, and belief, true in substance and in fact; and further he saith not.

A B.

Subscribed in my presence, and sworn to before me this day of , A. D. 18 .

WHERE STATE IS A PARTY.

A B, being first duly sworn, deposeth and saith that he is personally acquainted with the facts stated in said petition, wherein the said State of Ohio is plaintiff, and , defendant, and that the same are, according to the best of his knowledge, information, and belief, true in substance and fact; and further he saith not.

NOTE.—Where made by attorney, the affidavit must state the fact; otherwise it will be like the above.

BY AGENT OR ATTORNEY.

A B, being first duly sworn, deposeth and saith, that he is the attorney of record (or agent) of the said , plaintiff in the aforesaid action, and* that the facts set forth in said petition are within his own personal knowledge;

[*Or*, that the said plaintiff is an infant;

Or, that the said plaintiff is of unsound mind;

Or, that the said plaintiff is imprisoned;

Or, that the said petition is founded on a written instrument for the payment of money only, and that such written instrument is in the possession of this affiant, as the attorney of said plaintiff;

Or, that the said plaintiff is not a resident of said county of ;*

Or, that the said plaintiff is now absent from the said county of .]

*The agent or attorney is permitted to make the affidavit when the plaintiff is a non-resident of the county.

And this affiant further saith, that the several matters and things contained in said petition are, according to the best of his knowledge, information, and belief, true in substance and in fact; and further he saith not.

NOTE.—The various grounds which justify an attorney in making an affidavit are stated one after the other. Copy the affidavit to the *; then insert one of the causes stated, and conclude with what follows after the brackets.

AFFIDAVIT TO ANSWER.

The said C D, defendant in the above action, being first duly sworn, deposeth and saith, that the several matters and things contained in the foregoing answer are, according to the best of his knowledge, information and belief, true in substance and in fact; and further he says not.

C D.

Signed in my presence, and sworn to before me, this day of , A. D. 18 .

NOTE.—The other affidavits to answers are substantially the same as to the petition, with the exception of substituting the word *defendant* for *plaintiff*, and the word *answer* for *petition*. In verification of a reply to set-off or counter-claim the same change can be made; the only further change being to substitute *reply* for *petition*, the party still being the *plaintiff*.

Before whom Sworn.

It may be sworn to before any person authorized to take depositions. Still he must not be a party to the suit, nor the attorney of the party. Gilmore *v.* Hempstead, 4 Pr. 153; 12 Johns. 339; 3 Term 403; 2 Paige Ch. 326; 5 Paige Ch. 530; 15 Johns. 531; 17 Ib. 2; 6 Cowen, 587.

Depositions may be taken before a judge or clerk of the Supreme Court, a judge or clerk of the Court of Common Pleas, or a judge of the Probate Court; before a justice of the peace, notary public, mayor, or chief magistrate of any city or town corporate, or before a master commissioner; and hence these affidavits may be sworn to before any of these officers.

The officer must state his official character; and if he does, no other evidence of that fact is required, nor of his handwriting to the affidavit. His certificate proves itself.

Defects in Affidavits—What and how taken Advantage of.

The code seems to require that the certificate shall contain a statement that the party signed it in his presence and swore to it before him; and the above forms have been framed on this construction. In some districts the following form has been held sufficient, and in others not sufficient: *Sworn to and subscribed before me*, or *subscribed and sworn to before me.* It is easy to follow the language of the code, and there is no sufficient reason why a loose practice should be tolerated, which is a seeming departure from the code.

A defective *jurat* or affidavit may be taken advantage of by a motion to strike out the pleading which is not properly verified. When the pleading is stricken out for the want of a proper affidavit to the petition, it may be amended by adding a proper jurat or affidavit, and the case proceed as though the petition was properly sworn to before being originally filed. The suggestion in the first edition has been overruled by the courts generally, and the above practice adopted. It matters little which course is pursued, so the practice is understood. Where the pleading was properly sworn to, but the form of the *jurat* is defective, it was always susceptible of amendments; the only difficulty was where no *jurat* was attached to the petition. In such a case the clerk ought not to have issued any summons; it was, therefore, originally decided that, seeing there never was a proper petition filed, the summons was improperly issued, and hence there was no case in court. This would seem to be the *logic* of the question; but courts have ruled otherwise, whereby an attorney by filing a petition without a verification to obtain a service, when not being able then to obtain the necessary verification, he obtains a service, which binds the party to answer a case which was improperly commenced. By this sort of trick a service may be obtained on a non-resident of the state or county, which could not have been done had the plaintiff been required to verify his petition before filing it. For this reason the plaintiff may file his petition for the very purpose of obtaining a service, adding his affidavit at his leisure. Where it is done for that purpose, I have no doubt that the court, on motion, would set aside the service as an abuse of the process of the court. This question is discussed under the chapter on service, and may be referred to for explanation of the abuse of the process of the court.

MOTION TO STRIKE PETITION FROM FILE FOR WANT OF A JURAT.

A B
vs.
C D. } *County, ss.*
Court of Common Pleas.

And now comes the said A B, plaintiff, by C D, his attorney, and moves the court here to strike from the file of this case the petition filed therein, for the following reasons, to wit:

1. There is no sufficient jurat attached to said petition.
2. There is no jurat attached to said petition.

C D, Attorney for Defendant.

The same form will meet the case of an answer or reply, in case there is no sufficient jurat attached to the answer or reply, by changing the word "petition" to "answer" or "reply," as the case may be.

If the party finds that the objection is well taken, he should ask leave to amend by adding the necessary affidavit to the pleading. When that is done, the motion must be overruled, because, when once the motion is sustained and the pleading is stricken out, it must be sworn to and refiled. In the case of a petition, it would seem, if stricken out, the case was out of court, and no new suit can be instituted by the mere filing of a petition. But if the amendment is first made, and the motion overruled, then there will still remain a case in court. This is, therefore, the better practice. Answers or replies can be stricken out without changing the status of the case; but this is not so with the petition. A petition is the foundation of all that follows, and the foundation gone, it would logically follow that all resting upon it must fall along with it, and a new start have to be made.

CHAPTER XV.

TIME TO ANSWER.

I. *When the Answer and Reply shall be Filed.*

SEC. 103. The answer or demurrer of the defendant must be filed on or before the *third* Saturday, and the reply or demurrer of the plaintiff on or before the *fifth* Saturday after the return-day of the summons or service by publication.

The service by publication is completed on the day of the last publication of the notice; hence the defendant is bound to answer on the third Saturday next after the day of the last publication of the notice.

Extension of Time to Answer or Reply.

SEC. 104. The court, or a judge thereof, in vacation, for good cause shown, may extend the time for filing an answer or a reply, upon such terms as may be just.

This power of extending time to answer ought not to be exercised without notice, where it will operate as a continuance of the cause. Where there will still be time to prepare the case for trial after the expiration of the extended time, there can be little objection in granting the order almost of course. The unexpected absence of a party or counsel at the time when the answer must be filed, would be good ground for extending the time. So where a party can not answer without certain papers, which can not yet be obtained, an extension should be granted.

This extension can be granted in court, or by a judge out of court. When granted in court, the order must be entered on the journal of the court. While the court is in session, no order can be granted by a judge out of court. So when one judge was authorized to take bail in vacation, it was held that a bail-bond taken by a single judge during term was void. Sargeant *v.* The State, 16 Ohio, 267.

FORM OF ORDER.

A B, plaintiff,
vs.
C D, defendant. } Petition.

On motion of the said C D, by E F, his attorney, and upon good cause therefor being shown, it is ordered that the time for the said C D to answer the petition of the said A B (or, to reply, *as the case is*) be extended until the day of next.

ORDER IN VACATION.

A B, plaintiff,
vs.
C D, defendant. } *County, ss.* Court of Common Pleas.

On application made to the undersigned, one of the judges of the said Court of Common Pleas, by the said C D, and upon good cause therefor being shown, it is ordered that the time for the said C D to answer the petition of the said A B, be extended until the day of next.

Given under my hand this day of , A. D. 18 .

S N, Judge of said Court.

II. *Answer after a Default.*

The question is sometimes raised as to when a party is in default. There can not be any doubt usually, where no answer or reply has been filed. There are certain cases where a party is not bound to answer until he has obtained something from the opposite party. But there is a class of cases where this question arises and as to which I believe there is a conflict of opinion. It arises where an answer or reply has been filed, and the opposite party has obtained leave to amend, and has amended the petition or answer. Is the opposite party in default if he does not file a new answer? There are cases where the new matter inserted may require an answer as not being covered by the answer already filed. But that is a question for the pleader to consider; it has nothing to do with the question whether there is a default. The practice with some judges has been one way, and with other judges the other. I know of no Ohio case having any reference to this question. But in the case of Stevens *v.* Thompson, 5 Kansas, 305, the question is considered and decided. Kingman, C. J., delivers the opinion of the court.

"In the old chancery practice," he says, "the rule was that when a complainant amended his bill after answer, it was the right of the

defendant to put in a new or further answer to the amended bill, except where the amendment was a mere matter of form, which could not vary the rights of the defendant. But in the answer to the amended bill, it was not allowable to repeat the allegations of the former answer, unless the grounds of the suits and the defense to the same were waived in substance. Bowen *v.* Idley, 6 Paige, 48. But while this was the right of the defendant, he was at liberty, unless specially required to answer to some new charge in the bill, to let his first answer remain as putting in issue all the matters properly raised by it. At common law it seems a similar practice prevailed. Tidd's Pr. 708 and note E, and 6 Taunton, 673. Therein it was held that an amendment does not necessarily entitle the defendant to plead *de novo*, but only when the amendment alters the state of the defendant's cause.

"Now, the code of civil procedure is much more liberal in permitting amendments, and making the precision and technicalities of the rules of pleading yield to the great object of assisting the parties in obtaining justice, than was the common law. It permits amendments to be made to the pleadings during the trial; and even after trial and judgment the court may amend by adding or striking out the name of a party to make the pleadings conform to the proof; in this case, the amendment was adding the name of a party only. The answer of plaintiff in error, when it was filed, put in issue every fact in the plaintiff's pleading, original and amended, saving perhaps the simple one that Schmall was a member of the firm of H. M. Thompson & Co., and a necessary party in interest in the action.

"How, then, can he be said to be in default? He had appeared in the action; had filed an answer controverting such of the statements of the plaintiff's petition as he deemed essential. The restatement of the facts, in the amended petition, did not change the grounds of the action.

"Whatever of the original petition or the amendment is not controverted, must be taken as true, and need not be proven. But all the statements, in both of the petitions, save one, were denied, and so the case stood upon the record, when the cause was tried. As we understand the code, this made it incumbent on the plaintiffs to make out their case by evidence. The jury were instructed that the only question for them to consider, was the value of the goods when delivered. This was the law of the case, if the plaintiff in error was in default; but as we have seen that such was not the condition of the case, the instruction was erroneous, and for that reason the judgment must be reversed." This decision settles the

rule correctly, and should be everywhere followed. The old rule in such a case, that the defendant, after an amendment by the plaintiff, had a choice of one of two things: he could put in a new plea, or he would abide by his former plea; and a failure to file any other plea, was an election to abide by the one already on file. There could be no default with a plea or answer already on file; the plea or answer was good for whatever it would put in issue on the petition as amended. It was treated just the same as though the old answer or plea had been replied to the amended declaration or bill. So now, if the defendant thinks his answer on file meets and raises all the questions he wishes to raise on the amended petition, he will allow his former answer to remain, and he will rely upon it, and try all the issues raised by it. Of course, the pleader must be sure his answer covers all of the new petition he wants it to cover, or he must file a new one. His answer will be treated just as though it had been filed to the amended petition, and cover no more than a new answer in the same words would cover, if filed after the amendment had been made. It is useless to stuff the record with useless matter, since our clerks are in the habit of inserting both the original and amended pleading, even if the amendment has been made by rewriting the prior petition and incorporating the new matter in it, or leaving out matter which was redundant or improper.

Where a defendant omits to answer within the time prescribed, the court has power to let the defendant in to make a defense. Lynd *v.* Verity, 1 Code, 97; Allen *v.* Ackley, 4 Pr. 5.

Will the court limit the defendant in what defense he shall make on setting aside a judgment by default? We think not. The code now requires all pleadings to be sworn to, and defaults should therefore be set aside as of course, the party being simply required to answer immediately, so that the plaintiff will suffer no delay. In Grant *v.* McCaughin et al., 4 Pr. 216, Parker, J., refused to impose any condition as to the nature of the defense. He said so long as the statute made the taking of usury a defense, it was entitled to be treated like every other legal defense, and he would make no discrimination in imposing terms. In Ward *v.* Wood, 10 West. L. Journal, 505, it was held that the statute of limitations could be pleaded after a default. Mr. Justice Nash, in his opinion, reviews all the cases, and comes to the conclusion that, until the *dicta* in Ohio, there was not any such rule, and for a court to establish such an one is an act inconsistent with the plainest principles of law—is to administer a *moral* instead of a *legal* code. The same

doctrine is found asserted in Rucker *v.* Hanny, 3 Term, 124; Ham *v.* Goodwin, 1 Brevard, 461; 6 N. H. 124, 235.

There is now no necessity for an affidavit of a meritorious defense, since the defendant can interpose no defense to the truth of which he does not pledge his oath. A default, therefore, should be set aside as of course, and the defendant be permitted to answer instanter. This condition is necessary to prevent delays.

How Pleadings are to be Regarded.

Every material allegation of the petition not controverted by the answer, and every material allegation of new matter in the answer not controverted by the reply, are to be taken as true, or admitted; but new matter in a reply is to be taken as controverted without a rejoinder, as upon a direct denial, or avoidance. A court then has only to ascertain what is asserted on the one side and denied on the other, to know what is in dispute, and necessary to be proved; all else, so far as the petition and answer are concerned, is admitted; the new matter in the reply is alone to be proved without a denial.

A material allegation in a pleading is one essential to the claim or defense, and which could not be stricken out without leaving it insufficient.

Only those allegations in a complaint are to be deemed material, in the sense of the code, which the plaintiff *must prove upon the trial in order to maintain his action.* It is upon these only that an issue can properly be taken; and it is of these only that the truth is admitted by the omission in the answer of a specific denial. Per Duer, J., in Fry *v.* Bennett, 1 Code, N. S. 245; Newman *v.* Otto, 4 Sand. S. C. 668; Harcourt *v.* Hamilton, 6 Pr. 475.

These admissions can not operate as estoppels. They conclude the party only in that case. Estoppels must be found by a jury or be specifically admitted on the record. Outram *v.* Morewood, 3 East, 353; Manny *v.* Harris, 2 Johns. 24; Rymer *v.* Atwater, 4 Day, 431; Whittemore *v.* Shaw, 8 N. H. 393; Arnold *v.* Arnold, 17 Pick. 9; Dame *v.* Wingate, 12 N. H. 291; *vide* also 2 Pick. 20; 3 Pick. 288; 18 Pick. 564; 8 Blackf. 175; 4 Gill. & Johns. 345; 4 Conn. 276; 2 Barr. (Pa.) 492. These cases show that there can be no estoppel by implication.

Where damages or the mere value of articles are alleged, they are not admitted by an omission to deny them. They may be denied, but they need not be. The verification of a pleading does not apply to the amount claimed, except in actions founded on

contracts, express or implied, for the payment of money only. Hence, unless the contract is such that a breach can be assigned in the mere non-payment of money, the verification does not relate to it, and a failure to deny its correctness does not admit it. The amount must still be proved on a failure to answer.

III. *Answer or Reply after a Demurrer.*

SEC. 136. Upon a demurrer being overruled, the party who demurred may answer or reply, if the court is satisfied that he has a meritorious claim or defense, and did not demur for delay.

It will be seen by this section that the court must be satisfied of two things before it has power to permit an answer upon overruling a demurrer, whether to the petition or answer:

1. *That the demurrant has a meritorious defense.*
2. *That the party did not demur for delay.*

1. What then is a *meritorious defense*? The law settles what facts constitute a defense, and any defense which the law allows must, therefore, be *meritorious*, unless courts hold that the law allows *defenses* wholly destitute of merit—a conclusion which will hardly be adopted by a court whose duty it is to enforce the law. A defense which depends not upon the real dispute between the parties, but upon some mistake in preparing the case or the pleadings, is not meritorious. Hence the court would not allow one to answer in order to set up a variance, an informal defect in the pleadings, or any other matter aside from the case as the law regards it.

In order to protect itself and parties against delay, the court should require the answer to be drawn up and presented to the court, on the motion for leave to answer over. The court will then be able to judge of the character of the defense, and whether it ought to be let in at that late hour.

2. That the party *did not demur for delay.* When a plainly frivolous demurrer is interposed, for the purpose of rendering a continuance necessary on leave being given to answer over, the party ought not to be permitted to answer over, as it is an abuse of the practice of the court. Hence a demurrer must be shown to possess some plausibility, and not be on its face a mere pretense—a palpable sham. The party is bound to present his real defense at the earliest moment permitted by the practice of the court. He can not be permitted to file pleadings which on their face present no legal question, as a mere vexation or means of delay; and, if counsel will take such a course in a case, their clients must suffer

for their malpractice. Neither the interests of parties nor the administration of justice is promoted by such sharp practice. It is generally adopted by knavish lawyers to increase the fees to be charged in a case, since some charge according to the number of pleadings filed and continuances obtained.

The court can readily judge of the character of the demurrer; and if it appears *frivolous*—such a one as no fair lawyer could have filed with any expectation that there was any real question raised by it—the court should hold it to have been filed for delay, since no other reason can be given for filing it, and no further answer or reply should be permitted, save in a case where it is perfectly clear that the client has a good defense, and is being sacrificed to the ignorance or knavery of his lawyer.

CHAPTER XVI.

SUPPLEMENTAL PETITIONS AND ANSWERS.

SEC. 142. Either party may be allowed on notice, and on such terms as to costs, as the court may prescribe, to file supplemental petition, answer, or reply, alleging facts material to the case, occurring after the former petition, answer, or reply.

This section provides a supplemental pleading only in case of facts occurring after the filing of the former pleading. Matter which existed at the time of the filing of the original pleading must be introduced by amendment. Such was the rule in chancery, with a limited exception, that a bill could not be amended after issue joined. Under the code, amendments may be made at any time before judgment. Story's Eq. Pl. 682, 269. In Drought *v.* Curtis et al., 8 Pr. 56, Gridley, J., says: "The supplemental answer under the code is a substitute for the old plea *puis darrein continuance;* but it differs from that plea in this respect, that the supplemental answer may be allowed on motion, whenever the facts forming the ground of the answer have occurred since the answer was put in, whereas the plea of *puis darrein continuance* could strictly be pleaded only before or at the next continuance after the facts transpired. Where the facts asked to be incorporated and

pleaded in a supplemental answer go to divest the plaintiff of the right to maintain the action, and transfer the cause to another who has received satisfaction for the demand involved in it, it is the duty of the court to grant the motion. The word *may* in such a case means *must*, and it will make no difference whether the motion be made at the earliest day or not." A supplemental *complaint* is not an addition to the original complaint, but has the nature of another original complaint, which in its consequences may draw to itself the advantage of the proceedings on the former complaint. Per Edmonds, J., in Furniss *v.* Brown, N. Y. Code, 1852, p. 199, note; Hornfager *v.* Hornfager, 1 Code, N. S. 180; Radley *v.* Houtaling, 4 Pr. 251.

This question has come up for consideration in several cases decided since the first edition of this work. The first case to which I will refer is that of Penman *v.* Slocum, 41 N. Y. 53. In this case a petition was filed to obtain a declaration of trust for certain property, a part of the purchase money not being paid. After suit brought, this money was paid, and a supplemental petition was filed, setting up that fact, and claiming a share of it. James, J., in alluding to the subject, says: "A supplemental complaint may be resorted to where facts have occurred subsequent to the commencement of the action, which vary the relief to which the plaintiff was at that time entitled. I think it may be said, as held by the referee, that at the time this action was commenced, upon the facts as proved, the plaintiff was entitled to a judgment declaring his rights in the premises. If so, the subsequent payment of the whole of the purchase money varied the relief to which the plaintiff was entitled when the action was brought, and presented a proper case for a supplemental complaint. But the order allowing a supplemental complaint provided that if the referee before whom the action was to be tried, should be of the opinion that plaintiff was not entitled to any relief without proof that defendant received the $70,000 mentioned in said supplemental complaint, that then said referee should determine the question of the legal effect of the said fact not having occurred before suit brought, and should give such judgment, or prescribe such terms with reference thereto, as should be agreeable to law and equity and the rules and practice of court. This order was not appealed from, and it therefore binds and controls the parties in the proceedings under it. It constituted the referee an arbitrator of the questions presented by it, whose decision was final. The facts established by the referee outside the supplemental complaint entitled the plaintiff to a

judgment defining his rights under the agreement, and for an account of the money when received; and these facts, together with those found and declared under authority of the supplemental complaint, entitle plaintiff to further judgment for the amount received."

The nature of a supplemental petition came up again in the case of Taylor *v.* Taylor, 43 N. Y. 578, 586. Church, C. J., says: "A bill of revivor merely re-animated the suspending controversy. If *new interests* arose after the commencement of the action, which made it necessary or proper to change or modify the original claim, the parties necessary for this purpose were brought before the court by an original bill in the nature of a supplemental bill. Such a bill is properly applicable, when new parties with new interests, arising from events since the institution of the suit, are brought before the court. Story's Eq. Pl., sec. 345. Such a bill must show the grounds upon which the court ought to grant the benefit of a former suit, to or against the person who has become so entitled, and it must pray the decree of the court adapted to the case of the plaintiff in the new bill. Ib., sec. 353.

"The code has provided for supplemental complaints in both classes of cases, substantially in accordance with the practice in the court of chancery. Code, secs. 121, 177; 41 N. Y. 53. It is a new cause of action. 7 How. Pr. 31; 14 Ib. 71."

This section was again under consideration in the case of Medbury *v.* Swan, 46 N. Y. 200. Allen, J., delivered the opinion of the court. "The right to allege new matter by supplemental pleading," he says, "is not an absolute and positive right, but is made to depend upon the leave of the court in the exercise of a legal discretion. The application may be refused, if the new defense, although strictly legal, is inequitable, or if the application is not made with reasonable diligence. A party may waive his right altogether, or lose it by laches. Hoyt *v.* Sheldon, 6 Duer, 661; S. C., 4 Abb. 59. In one case, decided at special term, it was said that the word *may* in the statute, permitting supplemental pleadings, should be read as *must*, and that it was not material that the application for leave should be made at the earliest practicable day. Dwight *v.* Curtiss, 8 How. 56. The remark was not necessary to the decision, and I am not aware that the dictum has been followed or approved in subsequent cases. The word *may*, according to its ordinary construction, is permissive, and should receive that interpretation, unless such a construction would be obviously repugnant to the intention of the

legislature, to be collected from the terms of the act, or would lead to some other inconvenience or absurdity. The word *may*, in a statute, means *must*, or *shall*, in those cases, when the public are interested, and the public or third persons have a claim, *de jure*, to have the power exercised. P. D. & Co. *v.* Miller, 5 Johns. Ch. 101. Chancellor Kent, in the case referred to, says the word has such meaning only in the cases mentioned. By an English statute it was enacted that, 'if certain matters should be made to appear to the satisfaction of the court, in which certain actions were brought, or of a judge at chambers on summons, the court or judge *may thereupon*, by rule or order, direct that the plaintiff shall receive his costs;' and it was held that the statute left the matter discretionary with the court and was not compulsory. Jones *v.* Harrison, 6 Exch. 227; Lotham *v.* Spedding, 20 L. J., N. S., Q. B. 302. Had the legislature intended to confer an absolute right upon the party, it would not have required the idle ceremony of an application to the court for leave, but would have permitted the supplemental pleading to have been served of course. The statute would have conferred the right absolutely by appropriate words. See Minor *v.* M. Bank, 1 Pet. 64; Malcolm *v.* Rogers, 5 Cow. 188; King *v.* Corporation of Eyre, cited in Smith's Statutes, etc., 726.

"The supplemental answer takes the place of the former plea *puis darrein continuance;* but it is not like that, a waiver of defenses before interposed, and is not confined to matters arising since the last continuance. A plea *puis darrein continuance* could not be rejected, or treated as a nullity, because not pleaded in due time or at the proper time; and could only be set aside upon application to the court; and the court in its discretion could permit the plea to stand. Graham's Pr. 257, and cases cited.

"Delay in interposing the defense unexcused, was a reason for setting aside the plea; and delay in pleading an insolvent discharge was regarded as sufficient to exclude the defense. Sanford *v.* Sinclair, 3 Duer, 269; Desobry *v.* Morange, 18 Johns. 336; Valkenburg *v.* Dederick, 1 Johns. Ch. 134."

Such are the decisions in reference to this section. But it seems to me that there is an omission in all these cases of one material consideration. This section provides for supplemental petitions, answer, and replies. Now, a supplemental petition or answer was exclusively confined to equity suits and proceedings; they had no relation or resemblance to a plea *puis darrein continuance*. A supplemental bill was to bring before the court matters occurring after the suit was brought, and related to other parties than

the parties to the suit; whereas, a plea *puis darrein* was of matter occurring between the parties, which put an end to the suit, like a payment, a release, an award, etc. And the defendant put in this plea as of right. 1 Chit. Pl. 695. He did not ask leave of the court; he put it in at the first opportunity which occurred after the fact happened. Why then should language, which refers solely to proceedings in equity, be applied to a matter of legal defense, which the law gave him a right of pleading. Now by this construction he is deprived of a right which by law he had to put in this plea, he is left at the discretion of the judge, whether if he has paid a debt, suit pending, he may be permitted to set up such fact. Whatever was a good plea before the code is now a good answer. This is the rule the courts have laid down for the construction of the code, and yet here is a construction in direct violation of the rule. The matter of a supplemental bill or answer can not affect the rights of the parties, since the rights are to be decided as they were at the commencement of the suit; hence no rights are sacrificed by a refusal; the party is remitted to his original bill, when the prior case is ended, if not before. It is not so with the common-law plea, *puis darrein;* if he can not plead it, he must have an unjust judgment rendered against him. If he was in default for not pleading it in time, then he was at the mercy of the court, which can then refuse to let him plead a legal defense, and render a judgment against him contrary to law and the admitted rights of the parties. This distinction should be recognized, even if this section is to control the pleading of matter *puis darrein* in an action at law. The reason of the distinction is marked and clear, and should be listened to by every judge, who is called on to exercise his discretion in depriving a man of a legal defense guaranteed to him by positive law.

Under the old chancery practice, matter omitted when the bill was originally filed, and not discovered in time to be inserted as an amendment, may be introduced into the case by supplemental bill; but this need not be done under our practice, as an amendment can be made at any time. 2 Daniel Ch. Pr. 1653. Supplemental matter, then, is matter happening during the progress of the suit, by some event subsequent to the institution of the suit, so that the proceedings, as they stand, can not have their full effect. In some instances the abatement of a suit gives rise to new matters, which it becomes necessary to introduce into the proceedings, in which cases the proper remedy is by bill of revivor and

supplement. 3 Daniel Ch. Pr. 1654. In a case of that kind, a mere revivor under the code is not sufficient.

When the bill is so framed that, on the death of a party, all that is necessary to complete relief is to bring in his heirs or executors, or both, as the case may require, then a mere revivor is all that is necessary. But there are cases where, on the death of a party, new interests arise, which it is necessary to bring into the case before complete relief can be had; then a petition in the nature of a supplemental bill and a bill of revivor must be resorted to. Suppose the case of a petition for specific performance, and the defendant dies, having devised the land in dispute to others than heirs; in such case, the fact of the death, will, and probate of it, and the devise itself, must be brought into the case, as well as to make the devisees parties. A supplemental bill, in such a case, must be resorted to. The code does not provide for such a case by revivor. A supplemental bill may be necessary to remedy defects in a suit, which have occurred in consequence of the birth of new parties, or a change of the interests of those originally on the record. 3 Daniel Ch. Pr. 1654. When properly before the court, it is an addition to the original bill, and becomes part of it, so that the whole bill is to be taken as one amended bill. Gillet *v.* Hall, 13 Conn. 426. In Pedrick *v.* White, 1 Met. 76, it was held that to warrant the filing of a supplemental bill, it should be shown to the court either: 1. That the matter, relied upon as supplemental, arose after the original suit was commenced; or 2. That the facts relied upon first came to the plaintiff's knowledge, or were made known to him in such manner, that he could not avail himself of them after the cause had passed the stage in which he might have had leave to amend; or 3. That the plaintiff has been prevented, through inadvertence, misapprehension, etc., of himself, his agents, or counsel, or other cause satisfactorily shown, from availing himself of the proposed matter of his supplemental bill at an earlier stage of the cause. Candler *v.* Pettit, 1 Paige, 168; Stafford *v.* Howlett, 1 Paige, 201.

A supplemental bill, introducing new facts relating to the merits, ought not to be filed as a matter of course, but only by leave of the court upon sufficient cause shown. Tappan *v.* Evans, 12 N. H. 330; Pedrick *v.* White, 1 Met. 76; Eager *v.* Price, 2 Paige, 333; Lawrence *v.* Bolton, 3 Paige, 294; 1 Hoff. Ch. Pr. 403. Matters which have occurred since the original bill was filed, and which are material to perfect the plaintiff's case, may also be introduced into the record by supplemental bill. Story's Eq. Pl.,

secs. 335, 336, and note; Greenleaf *v.* Queen, 1 Pet. 148; Candler *v.* Pettit, 1 Paige, 168; Stafford *v.* Howlett, 1 Paige, 200. Thus where a plaintiff has an inchoate right at the time of filing his original bill, which merely requires a formal act to complete it, which is not performed till afterward, such formal act may be brought before the court by supplemental bill, as in the instance of an executor or administrator filing a bill before probate or administration taken out; in such a case, the fact of the probate or administration having been granted, may be introduced by amendment; but if the record is not in a state to admit the amendment, it may be introduced by supplemental bill. Humphreys *v.* Humphreys, 3 P. Wms. 508. When any event happens subsequently to filing an original bill, which gives a new interest or right to a party, it should be set out in a supplemental bill. Saunders *v.* Frost, 5 Pick. 276. A supplemental bill must follow the original complaint, and set forth actual and subsequent damages arising from the same cause set forth in the bill. Bardwell *v.* Ames, 22 Pick. 375; Story's Eq. Pl., secs. 336, 339. In Bardwell *v.* Ames, the court say: "In regard to these damages, it may be proper to make another suggestion. When this bill was brought, the wrongs sought to be redressed were anticipated, not actually suffered. All the acts and *torts* for which damages were awarded were done, it is believed, after the suit was commenced. It may be a question whether damage in such a case can be awarded without a supplemental bill, showing that the injury feared had been realized; but whether a supplemental bill, in point of form, would be necessary or not, is immaterial; because, if a supplemental bill could be filed, it must follow the original complaint, and set forth actual and subsequent damages arising from the same cause set forth in the bill." In that case an injunction was prayed to enjoin the defendant from using over a certain quantity of water drawn from a certain pool, and to obtain damages for taking such excess.

The reader is to be reminded that a plaintiff can not support a bad title by acquiring another after the filing of the original bill, and then bringing it forward by a supplemental bill. Tonkin *v.* Lethbridge, Cooper, 43. Thus, in the above case, when the plaintiff filed his original bill to redeem a mortgage as heir at law of the original mortgagor, and, upon issue directed, was found not to be heir; but, in the meantime, he had bought in the interest of a third person, who claimed to be heir, and had amended his bill by stating that fact, and upon the issue being found against

him, he filed a supplemental bill stating the purchase, and praying that he might be declared entitled to redemption and conveyance prayed by the original bill. To this supplemental bill the defendant demurred, "because it did not appear by such supplemental bill that any new matter had arisen since the filing of the original bill in the cause, which was properly matter of supplement, and the demurrer was allowed; Lord Eldon observing that to entitle a plaintiff, by a supplemental bill, to the benefit of the former proceedings, it must be in respect of the *same title* in the *same person*, as stated in the original bill." The same principle appears to have been acted upon by Lord Thurlow in Davidson *v.* Foley, 3 Bro. C. C. 598, and by Lord Brougham in Pritchard *v.* Draper, 1 R. & M. 191. It is, however, to be remarked that it is only where the first title is absolutely bad that a supplemental bill of this description will be improper; where the plaintiff had originally a good inchoate title, which only required some formal act to make it perfect, there the statement of such act by a supplemental bill will be permitted. Thus, in Mutter *v.* Chauvel, 5 Russ. 42, where the plaintiff claimed a right to the rents and profits of the benefice by virtue of a nomination by himself, under an equitable right to nominate, derived from his father's will, and filed his bill against the incumbent and others for an account of such rents and profits from the time of his nomination, etc.; and it appeared, upon the hearing, that a deed of release from his sisters to the plaintiff, which formed an essential part of the plaintiff's title to the right of nomination, was not executed till long after the filing of the bill, Sir Thomas Plumer, M. R., permitted the case to stand over, with liberty to the plaintiff to file a supplemental bill for the purpose of regularly introducing the release from his sisters.

A supplemental bill, for the purpose of adding new matter, or for bringing new parties before the court, may also be filed after, as well as before the decree; thus where a defendant appealed from a decree of the master of the rolls, but before it was brought on, the plaintiff, apprehending that he had not proper parties before the court, when the decree was pronounced, to enable them to carry it into effect, filed a supplemental bill for the purpose of bringing the necessary parties before the court; to the supplemental bill the defendant demurred, but the demurrer was overruled. Woodward *v.* Woodward, 1 Dick. 33.

The reader may also be reminded in this place that where a bill has been exhibited against a man and his wife, and the husband dies pending the suit, and a new interest thereupon arises to the wife,

a supplemental bill ought to be filed for the purpose of giving the wife an opportunity of putting in another defense in respect to her newly acquired interest. Shelbury *v.* Briggs, 2 Vernon, 248; 1 Eq. C. Abr. 1 pl. 4. So if a plaintiff, suing in his own right, make such an alienation of his property as to render the alienee a necessary party to the suit, but not at the same time to deprive himself of all right in the question, he must bring the alienee before the court by supplemental bill, or the alienee may himself file a supplemental bill against the original plaintiff and the other parties to the suit, to have the benefit of the proceedings. Binks *v.* Binks, 2 Bligh, 593. In like manner, if a plaintiff suing in his own right is entirely deprived of his interest, but is not sole plaintiff, the defect arising from this event may be supplied by a bill of this kind. Lord Red. 63. So if a plaintiff becomes insane, a supplemental bill may be filed in the joint names of the lunatic and his committee. 1 Daniel Ch. Pr. 1664.

It is to be recollected here that an assignment or alienation, *pendente lite*, is not permitted to affect the rights of the other parties, unless the alienation disables the party from performing the decree of the court, as in the case of an assignment of a mortgagee of his interest in the mortgage pending a suit to redeem; in which case the assignee must be brought before the court by a supplemental bill. Lord Red. 74. Where, however, the assignment, *pendente lite*, is of an equitable interest, as in the case of bankruptcy by operation of law, there does not seem to be any absolute necessity for the assignee to be brought before the court, nor does it seem to be material whether the assignee is a plaintiff or defendant to the bill. Earles *v.* Harris, 1 Y. & C. 235. In such a case, however, unless the alienee can be protected by the ordinary course of petitioning for an order that the alienor may not take the fund he is entitled to in the suit out of court, without notice to him, he (the alienee) may make himself a party to the suit by supplemental bill against the other parties. Foster *v.* Deacon, Mad. & Geld. 59.

If, however, *a sôle plaintiff suing in his own right*, is deprived of his whole right in the matters in question by an event subsequent to the institution of the suit, as in case of a bankrupt or insolvent debtor, whose whole property is transferred to assignees; or, in case such a plaintiff assigns his whole interest to another, the plaintiff, being no longer able to prosecute for want of interest, and his assignees claiming by a title which may be litigated, the benefit of the proceedings can not be obtained by means of a supplemental bill, but must be sought by *an original bill in the nature*

of a supplemental bill. 3 Daniel Ch. Pr. 1666. In this bill, a new defense may be made, the pleadings and depositions can not be made use of in the same manner as if filed or taken in the same cause, and the decree, if any has been obtained, is no otherwise of advantage than as it may be an inducement to the court to make a similar decree. Attorney-General *v.* Foster, 2 Hare, 81; S. C., 13 Sim. 282; whilst in a case of a mere supplemental suit, the benefit of the original decree, if obtained, is expressly given to the new plaintiff by the supplementary decree, and he is declared entitled to stand in the place of the plaintiff in the original bill, and to have the benefit of the proceedings upon it, and to prosecute the decree, and to take the steps necessary to render it effectual.

In the FIRST place, on the authority of Lord Redesdale (Ld. Red. 65), we have seen that upon the bankruptcy of a sole plaintiff, his assignees proceed by original bill in the nature of a supplemental bill.

In the SECOND place, where a sole plaintiff executes an assignment of his whole interest in the suit, notwithstanding the assignee claims under the former plaintiff, he must, in like manner, proceed by original bill.

We shall hereafter find that, in general, where the interest of a plaintiff is transmitted to another person, coming in under the same title, the suit may be proceeded with by a common supplemental bill in continuation of the original suit.

The reason why an assignee of the plaintiff must file an original bill is stated to arise from the doctrine of maintenance; hence such an assignment is illegal, unless the suit relates to specific property, and the assignment then must be of the property and not of the suit; and that carries with it the right to sue in regard to that property. 3 Daniel Ch. Pr. 1667.

THIRDLY. We have seen when the plaintiff sues in *autre droit* and his interest determines, his successor, representing the same interest, may proceed by a simple bill of supplement, and this rule applies, although he does not claim under the former plaintiff. 3 Daniel Ch. Pr. 1667, 1665.

This brings us to the consideration of another case, in which a supplemental bill is frequently resorted to, to wit, where in a suit instituted by a creditor, on behalf of himself and other creditors of a person deceased, the creditor who files the bill dies, and his representative omits to continue the suit after decree. In such case, it is almost a matter of course to permit another creditor, who has come in under the decree, and established his claim as a cred-

itor before the master, to take up the proceedings by supplemental bill, but notice must first be given to the representative of the deceased plaintiff to revive, and then, if he does not, the other creditor may, on leave, file a supplemental bill. 3 Daniel Ch. Pr, 1674; Houlditch *v.* Marquis Donnegal, 1 S. & G. 491; Dixon *v.* Wyatt, 4 Mad. 392.

If the supplemental bill is occasioned by an event subsequent to the original bill, it must state that event, and the consequent alteration of the parties thereon; and it must pray that the defendants may appear and answer to the charges it contains; for if the supplemental bill is not for a discovery merely, the cause must be heard upon the supplemental bill at the same time that it is heard upon the original bill, if it has not been before heard; and if the cause has been before heard, it must be further heard upon the supplemental matter. Story's Eq. Pl., sec. 343; Pedrick *v.* White, 1 Met. 76.

In reference to the case already existing, a supplemental bill should state so much of the case as shows that he has an equity against such defendant. With respect to a simple bill of supplement filed against the parties to the original suit, for the purpose of putting in issue new matter, it does not seem that it was ever the practice to introduce statements from the pleadings in the original suit. Where a new party is to be brought in, the supplemental bill is an original bill as to him, and must state enough of the case to put the title of the plaintiff to relief against such new defendant in issue; the new party can not be called on to answer the original bill; there is no other method by which the plaintiff's title to maintain the suit can be put in issue than by a statement of it in the supplemental bill. It is, however, to be observed that, for this purpose, the mere statement of the former proceedings has been held sufficient to put the facts of the case in issue with regard to this sort of defendant; that is, you may, in the supplemental bill, state that you have made such a representation in the former bill, instead of representing the facts in the second bill. Lloyd *v.* Jones, 9 Ves. 37. The form of the supplemental bill will vary according to the character of the supplemental matter to be inserted. If the object is merely to introduce a new fact or facts, the existence of the original suit and the new matter are all that need be stated; whereas, when new parties are to be brought in, the name of the suit, the parties thereto, and the substance of the petition and other pleadings and proceedings up to

that time must be stated, and the facts showing a right to relief to the new party.

On an *ex parte* application for leave to file a supplemental bill, a court examines the question so far as to see that the privilege is not abused for the purposes of delay and vexation to the defendant. Eager *v.* Price, 2 Paige, 333. In a doubtful case, the court may direct notice to be given of the application to the defendants who have appeared. Ib. The application may be made either by motion or petition. A bill of this nature ought to be filed as soon as the new matter sought to be inserted therein is discovered. And if the party proceeds to a decree after the discovery of the facts upon which the new claim is founded, he will not be permitted afterward to file a supplemental bill, in the nature of a bill of review, founded on such facts. Pendleton *v.* Fay, 3 Paige, 204; Story's Eq. Pl., sec. 338*a*. If such bill is filed without sufficient grounds, the defendant must make the objection by plea, answer, or demurrer. Lawrence *v.* Bolton, 3 Paige, 294; Fulton Bank *v.* N. Y. & S. Canal Co., 4 Paige, 127. A supplemental bill may be filed after publication is passed. N. A. Coal Co. *v.* Dyett, 2 Edw. 115; Pleasants *v.* Logan, 4 Hen. & Mumf. 489.

It will thus be seen what are the principles and what the practice in relation to supplemental petitions. The code merely adapts the rules of chancery as to supplemental pleadings, as to facts arising after the pendency of the suit. Without the prior practice in regard to the matter, we could hardly tell what was here meant, and in what cases such a proceeding would be proper. And, as is said above, the distinction between the meaning of this section, in its relation to proceedings at law, and supplemental matter in a suit in equity. There can be no supplemental petition in an action at law; in this respect, the section is limited to suits in equity.

Supplemental answers are answers where omissions made in the first answer are sought to be supplied. These cases would, under the code, be met by an amendment. Whatever could have come in, in the original answer, must, if omitted, come in by an amendment of the answer. The courts in chancery were cautious in allowing answers, which were put in under oath, to be amended, or a supplemental or additional answer to be filed; it was only done when the fact was then unknown, or when he was advised by counsel that it was unnecessary. So, where the defendant had been induced, by the misrepresentation of the plaintiff, that certain securities mentioned in the bill had been fairly obtained, to

put in an answer admitting the securities, etc., the defendant was permitted, upon motion, to file a supplemental answer. Curling *v.* Marquis of Townsend, 19 Ves. 628. In Baursfield *v.* Patterson (cited 1 Smith Ch. Pr. 271), a defendant was allowed to file a supplemental answer, for the purpose of stating that, since his original answer had been filed, probate had been granted of a will mentioned in the pleadings. Anon., 1 Hopk. 27; Smith *v.* Smith, 4 Paige, 132; Taylor *v.* Titus, 2 Edw. 135. In an anonymous case (1 Hopk. 27), a petition was presented by a defendant, setting forth that, since the filing of his answer, he had procured the exemption of his person from imprisonment, under the act for that purpose, and prayed for leave to file a supplemental answer; and the court allowed it to be done. Mr. Emmett objected, as it was matter for a cross-bill. And such, in fact, is the chancery practice. "A cross-bill may be filed to answer the purposes of a plea *puis darrein continuance* at common law. Thus, when pending a suit, and after replication and issue joined, the defendant, having obtained a release, attempted to prove it, *viva voce*, at the hearing, but it was determined that the release not being in issue in the case, the court could not try the fact, nor direct a trial at law for that purpose, and that a new bill must be filed to put the release in issue. 3 Daniel Ch. Pr. 1743; Mit. Pl. 82; Hayne *v.* Hayne, 3 Ch. 19; 3 Swanst. 472, 474; Story's Eq. Pl., sec. 393. In Smith *v.* Smith, 4 Paige, 432, the chancellor left undecided whether matter happening after suit brought should be taken advantage of by answer or cross-bill. The case in Hopk. 27, was called to his attention, and he did not seem inclined to follow it.

It would seem that there was no such thing as a supplemental answer under the practice in chancery; the only instance at law was the plea *puis darrein continuance*. But it would seem that the code had changed the rule in chancery, and now, whether in an action at law or a suit in equity, any matter material to the decision of the case may be brought before the court by a supplemental answer to be filed on motion and notice to the opposing parties, and on leave of the court. There are no cases to serve as a guide in a suit in equity, nor any prior practice; and the courts must do the best they can to create a practice which will subserve the ends of justice. Some light to guide may be obtained from the practice in regard to supplemental bills already stated.

As to supplemental reply, that goes one step further than any court or practice has gone. When a case arises of new matter for a reply, the court must dispose of it as good sense and analogy

and justice would seem to require. There is no light shining in the past to guide it.

The New York code also applies to matters which were unknown to a party at the time of filing his original complaint, answer, or reply. The Ohio code is restricted to matters which have occurred since that time. A matter which occurs between the filing of the petition and the answer may be set up in the answer.

This supplemental petition, or answer, or reply, must be filed on motion to the court, and on notice to the other party. The notice need only show that the party will apply to the court for leave to file a supplemental petition, etc., at a named time. The motion must be supported by the affidavit of the party, showing the facts which he wishes to set up in his supplemental pleading.

FORM OF NOTICE.

A B, plaintiff, *vs.* C D, defendant. } *County*, *ss.* Court of Common Pleas.

The said A B, plaintiff, will take notice that the said C D, defendant, will apply to the said court on the first day of its next term (or, if court is in session, on to-morrow), or as soon thereafter as he can be heard, for leave to file a supplemental answer in the above case, at which time you can be present and object, if you see proper.

Dated, etc.

C D,
By E F, Attorney.

AFFIDAVIT IN SUPPORT OF THE MOTION.

A B, plaintiff, *vs.* C D, defendant. } *County*, *ss.* Court of Common Pleas.

And the said C D, being first duly sworn, deposeth and saith that since the commencement of this suit, the said A B has transferred and assigned all his right, title, and interest in the claim sought by him to be enforced in this action, to one N O, and that this defendant has, since said transfer and since the filing of his former answer, paid to said N O $, in full satisfaction and discharge of the sum of money sought to be recovered in this action, and the said defendant saith that he wishes to set up said facts in bar of the present action; and further he saith not.

C D.

Signed in my presence, and sworn to before me, this day of , A. D. 18 .

Justice of the Peace.

ENTRY.

On motion of the said C D, by N O, his attorney, and on presentation of his affidavit, it is ordered that the said C D be permitted, within days, to file a supplemental answer, setting up, by way of defense, the facts stated in his affidavit exhibited on the hearing of this motion.

MOTION FOR LEAVE TO FILE SUPPLEMENTAL ANSWER.

A B, plaintiff, *vs.* C D, defendant. } *County, ss.* Court of Common Pleas.

The said C D, defendant, now comes and moves the court here for leave to file a supplemental answer to the petition of the said A B, setting up by way of defense, that since the filing of the former answer in this case by said defendant, the said plaintiff has assigned all his interest in the claim sought to be recovered in this action to one N O, to whom this defendant has paid said claim.

C D,
By E F, his Attorney.

NOTE.—It is doubtful whether this motion need contain a statement of what the facts are. They will appear to the court in the affidavit and on the record when the answer is filed. It would seem, therefore, that no facts need be stated in the motion put on file. If any are stated, it need only be very briefly, so as to show that they will constitute a defense to the action.

CHAPTER XVII.

AMENDMENTS.

I. *Amendments without leave of Court.*

SEC. 134. The plaintiff may amend his petition without leave at any time before the answer is filed, without prejudice to the proceeding; but notice of such amendment shall be served upon the defendant or his attorney, and the defendant shall have the same time to answer or demur thereto as to the original petition.

Under our practice there is no use in requiring the notice to be given. The party might often as well begin anew, as it will cost as much to serve the notice as to dismiss the first and commence a new action. In New York these notices are necessary, since by its practice the papers in a case *are not filed in court*, but *retained by the attorney* until he wishes to have his judgment entered or his case tried. He serves copies of his petition on the opposite party; and hence if he alter his petition he must notify his adversary of it; otherwise his adversary has the right to presume that the case is to be tried on the petition as served on him. In Ohio all pleadings are filed in court; are open to the inspection of both parties; and if altered or amended before answer, the other party, when he comes to answer, must know it, and know also when by law he is required to answer. Still here again is an absurd provision copied from the practice of another State, which practice is wholly unlike our own, and the effect of which is to render this right of amendment almost useless.

Sec. 135. So at any time within ten days after a demurrer has been filed, a party may amend the pleading demurred to; but he must again give notice of it to the adverse party and pay the costs. Under our practice there are no costs save the mere pittance for filing the demurrer; while in New York, under their mischievous fee-bill, this payment of costs has a very different meaning; it there means the fees of the attorney for drawing and filing the demurrer—a fee fixed by law.

Under these provisions a party has no right to amend his complaint, by striking out the name or names of one or more parties, without leave of the court. Russell *v.* Spear, 3 Code, 189. Section 137 provides for amendments by striking out or inserting the names of parties, and that can be done only on leave of the court. Hence this is not one of those amendments that can be made of course. Nor will the plaintiff be allowed, under the form of an amendment, to introduce in effect a new bill or answer. Verplanck *v.* Merch'ts Ins. Co., 4 Edw. 46; Dodd *v.* Astor, 2 Barb. Ch. 395; 18 Johns. 310; 2 Wend. 259. If such an amendment is made, the defendant can not treat it as a new action. McGrath *v.* Van Wyck, 2 Sandf. S. C. 651. In Russell *v.* Spear, 5 Pr. 142, the court says: "There is no part of the code which permits a plaintiff to change the parties in the cause without leave of the court. This section of the code applies only to such amendments as will not create an action between other parties."

So where the action was commenced in the nature of a replevin for goods, and the plaintiff amended before answer so as to make it an action on a promise to pay for the same goods, the court held that the amendment was irregular and should be set aside, and that an answer which had been filed to the amended complaint, as to a new action, was also irregular; because, though the amendment was improper, it was not the commencement of a new action, nor could the defendant make it such by his answer. McGrath *v.* Van Wyck, 2 Sandf. S. C. 651.

The amendments, then, which are amendments of course, are only such as to supply some omission in the original pleading, without working a change of parties or of the cause of action. If a second answer is filed, which in its legal effect is the same as the first, it is not an amended, but a new answer, and will be stricken out on motion. Snyder *v.* White, 6 Pr. 321.

The word *amendment* implies that there is an action existing which is to be amended. Hence never can a new action be commenced, or a new cause of action inserted, under the pretense of an amendment. This is no amendment of an existing action or cause of action, but the commencement of a new action; the insertion of a new ground of recovery. Neither a party nor the court has any power to do this, under the false pretense of an amendment. The rule is thus stated in Field *v.* Morse, 8 Pr. 47, by Welles, J.: "It is not allowable to a party, under the privilege given to amend of course, to substitute a new and different cause of action or defense in the amended pleading; but he may change the manner of stating the same, may leave out redundant or irrelevant matter, or add facts in support of the cause of action or defense stated in the original pleading." The same view of the question is taken by Strong, J., in Hollister *v.* Livingston, 9 Pr. 140, where it is said that the amendment must be confined to the matter of the original pleading, and can not introduce new causes of action.

II. *Amendments by leave of Court after a Demurrer has been sustained.*

Sec. 139. If a demurrer is sustained to any pleading, the adverse party may be permitted to amend, if the defect in the pleading can be remedied by amendment; and this leave to amend may be with or without costs, at the discretion of the court.

This section does not authorize the introduction of a new cause

of action. No amendment can be permitted, save to improve the statement of a cause of action already in the complaint.

Where the action is one of a legal character, the parties can not be changed; but where the petition is a proceeding *in rem*, there the material thing is the *subject matter* of the suit, and parties are a mere incident to this, and hence new parties can be added if necessary. So a person who appears in such a case to have no interest in the subject of the action or bill, might demur, and the bill be at once dismissed as to him. The same rule would now undoubtedly be applied in similar cases. But to change the parties in an action on a legal claim, is to commence a new suit on a new cause of action.

III. *Amendments by leave of Court generally.*

Sec. 137. The court may, before or after judgment, in the furtherance of justice, and on such terms as may be proper, amend any pleading, process, or proceeding, by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case, or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved. And whenever any proceeding, taken by a party, fails to conform in any respect to the provisions of this code, the court may permit the same to be made conformable thereto by an amendment. Walter *v.* Bennett, 16 N. Y. 250; 1 Ohio St. 409; 6 Ib. 61; 8 Ib. 201, 322; 9 Ib. 519, 526; 10 Ib. 620.

This section is very broad and comprehensive, and allows the court seemingly an almost unlimited discretion. If such had been the construction given to the code, a court of errors would have had no supervising power over the court below. The authorities hereafter cited show that the discretion exercised by an inferior tribunal under authority of law is not a matter on which error can be assigned. But the courts of error have seized hold of the expression, *in furtherance of justice*, as words limiting the exercise of this discretion to a *legal* discretion; and hence on error the court will examine the exercise of this discretion, and if not exercised in furtherance of justice, in the opinion of the revising court, the revising court will reverse the judgment. In the case of Doty *v.* Rigour & Co., 9 Ohio St. 526, 533, the judge, in the opinion of the court, says: "The provision of the code under consideration evidently

contemplates only such amendments after judgment as are clearly *in furtherance of justice*, and consistent with the rights of all parties interested in such amendment. And although the exercise of the discretion so clearly given to the courts, to allow amendments for the furtherance of justice, must be presumed to have been properly exercised, a supervising court will always regard such discretion as a *legal discretion*, and carefully look to the circumstances and extent of its exercise. For, unless such discretion be cautiously and prudently exercised in the amendment of records, such amendments will rarely be found to result in furtherance of justice." There are several other cases wherein the Supreme Court has examined the action of an inferior in allowing amendments, and clearly recognized the power of that court to supervise the rulings of the court below in the matter of amendments. In United States *v.* Collier, 6 Ohio St. 61, Bartley, C. J., says: "Amendments at common law rested in the discretion of the court, and were allowed only in *furtherance of justice.* And under the code of civil procedure, we do not find any authority extending this discretion so far as to enable a party, after he has failed in his action, and judgment has been entered against him, to amend by substituting a form of proceeding under the code for a form of proceeding not instituted under the authority of the code. And if any warrant could be found for such a stretch of authority, certain it is, it would never be exercised, except in a very clear and strong case, demanding it *in furtherance* of justice."

In the case of Woolsey *v.* Trustees of Rondout, 2 Keys, 603, 604, Morgan, J., says: "It may be admitted that the original complaint was not sufficient to resist a demurrer; but the defendant having gone down to trial, I think it was right in the referee to allow the amendment. Although the objection was not obviated by the defendant's neglect to put in a demurrer, it was obviated by the amendment. Indeed, the referee was not required to dismiss the plaintiff's complaint on the defendant's motion, but might have proceeded to try the action without an amendment. The evidence on the trial having supplied the defect, the plaintiff would be entitled to amend, even after judgment. Lounsbury *v.* Purdy, 18 N. Y. 515. If a defendant will lie by until the trial, before objecting to the sufficiency of the complaint, I think it is a proper exercise of discretion in the court or referee, under section 173, to allow the necessary allegations to be supplied by amendment, when they do not amount to a new cause of action."

In the case of Shamokin Bank *v.* Street, 16 Ohio St. 1, 9, it was

held that a deposit of money in lieu of an undertaking for an appeal laid no ground for leave to amend by filing such undertaking as an amendment; the statute then not allowing such deposit in lieu of the undertaking. The court say: "There certainly was no *undertaking* in any admissible sense of the term. The entry on the journal was made by Jordan, as clerk, and not as an obligor or surety. It is a mere *memorandum* of the fact that *money had been deposited* in lieu of an undertaking. It has none of the elements of an undertaking, such as the statute requires. It is *ex parte*. It is a private memorandum, made to aid the memory of the clerk as to the *fact of the deposit*. It was not the entry on the journal that the clerk "approved." He approved the security—the $200 deposited. The plaintiff had no *intention*, and he took no steps, to file an undertaking. What he intended was to *deposit money* in lieu of the undertaking, and, possibly, to preserve evidence of the facts. He fully accomplished all he intended or attempted. No doubt he omitted to file the undertaking, in ignorance of the law, and acted in good faith, believing that a deposit of money would be all that was required. But is it sufficient? Is the simple fact that money was deposited, with the general intention of *complying with the law*, enough to give jurisdiction? It is neither an undertaking nor a proceeding for the purpose of filing an undertaking. It can not be amended into an undertaking. . . . I know the general power of amendment given to the courts by the code is very broad, and is only limited by the *justice* of the case. But the statutory *thing* to be amended must exist before the power can be exercised. Under the present statute, an imperfect *deposit* of *money*, or steps taken to make it, could be amended or aided. Before its passage, it was only an *undertaking*, or steps taken to give one, that could be so amended or aided." It had been before decided, in Irwin *v.* Bank of Bellefontaine, 6 Ohio St. 81, that an imperfect and defective undertaking of appeal was a proceeding under the code, which might be amended by giving a proper and legal one, and thus perfect the appeal. *Vide* also State *v.* Bowman, 10 Ohio, 445.

This case admits that, in order to justify an amendment, there must be something to amend. In the case of Comm'rs of Delaware *v.* Andrews, 18 Ohio St. 49, the court held that, under a leave to amend, a new cause of action could not be interposed, and if it was, it might be stricken out on motion as impertinent and redundant matter. This was an action on a bond. The plaintiff got leave to amend, and the court say: "But if the amended petition be construed as having, in addition to an amended cause

of action on the bond, another cause of action interlarded with and masked under that, it can hardly be claimed that the court erred in sustaining the defendant's motion to strike out all the matter that was redundant to the action on the bond." In this case, it was sought to introduce a cause of action barred by the statute of limitations at the time the amendment was made. This case shows that the amendments provided for in this section must be limited to improving the statement of the cause of action already defectively set forth. To insert a new cause of action is not to amend, and can not be made an amendment. The ruling of the court in the above case at once expurgated the petition of matter not material to the action on the bond, and was also equivalent to a refusal to so far extend the leave to amend as to permit the plaintiffs to ingraft on the original cause of action a new and distinct cause of action that was barred by the statute of limitations. The bond in this case was held to be illegal, and the amendment sought to introduce a cause of action founded upon a fraudulent obtaining the money, to secure the payment of which the bond was given. This case would, therefore, seem to hold that where a suit is brought upon a written contract, and a recovery can not be had on the written contract, you can not by amendment introduce a new cause of action founded on the consideration of the written agreement. The two causes of action are separate and distinct, and could not both be stated in the same petition, as it would be stating one cause of action in two forms. There can now be but one statement of a cause of action; and hence the pleader must elect which remedy he will resort to. The pleader can no longer declare on a note, and add a count for money had and received; he has but one cause of action, and he must elect which he will pursue. If the note is void, then his remedy is for the money loaned, or paid for the goods sold and delivered, or whatever may be the consideration of the note. If he can not insert the two counts originally in his petition, how can he insert the second, when beaten on the first by way of amendment? It would, therefore, seem conclusively and logically to follow that no legally new cause of action can be inserted by way of amendment under the code, though the causes may relate to the same subject matter. This would be allowing indirectly what can not be done directly, to wit, the statement in the same petition of a single cause of action in a double form or aspect, so that if there is a failure on one, a recovery may be had on the other. Whether it is wise to have adopted so restricted a rule of pleading or not, is not a ques-

tion for the court, but for legislation. Such is the rule of the code, and it should be rigidly adhered to, if there is to be any uniformity in the practice.

In an action against a firm by its firm name, not being able to ascertain the names of the members of the firm, one of the firm entered his appearance and set up the goods belonged to the firm; on the trial by a referee he found in favor of the defendant. After the prosecution of a petition in error, the court below allowed the insertion of the names of the other two members of the defendant firm. "These defendants," say the court, "were prosecuted in their firm name, he alleging in his complaint that the names of the individual members of the firm were unknown to him. Fredericks only appeared and answered in the first instance, claiming the goods in behalf of his firm. He also put in a supplemental answer, in which he claims judgment in his own favor for the value of the goods, and not in favor of himself and his copartners individually. After judgment the defendants were allowed by the court, at general term, to amend by entering an appearance *nunc pro tunc* for the other two partners, and to amend the supplemental answer so as to make it a claim in behalf of all the members of the firm individually, and a demand for judgment in their favor. It does not appear from the record how many of the defendants had been served with process, nor why the two who were allowed to appear so as to bind them by the judgment, did not appear at an earlier stage of the proceedings. . . . The case had been fully tried upon its merits, and the amendment was only in furtherance of justice. And when the question is one of a common or general interest of several persons, one or more may be allowed to sue or defend for the benefit of the whole. Code, sec. 119. It was wholly unnecessary to bring in the firm of Kersel Brothers. They did not pretend to have any title to the property, or right of control over it. But even if they were to be regarded as the general owners, the defendants, who were in fact consignees, could recover the value of the property converted by a stranger." So it was held in Ackley *v.* Tarbox, 31 N. Y. 564, that in an action in the name of the husband and wife for damages to her separate property, the joining of the husband is unnecessary, and under section 173 of the code it may be stricken out of the pleadings and record at any time, either before or after judgment. "As soon," say the court, "as the objection was taken that the husband was an unnecessary party, as he clearly was, it was the duty of the court to have stricken his name from the proceedings in the action.

It can now be done, and the judgment stand as it ought, a judgment in favor of the wife for injury to her personal property."

In Hollister *v.* Judges of District Court, 8 Ohio St. 201, Bartley, C. J., says: "Every court of record has a supervisory and protecting charge over its records and the papers belonging to its files, and may at any time direct the correction of clerical errors, or the substitution of papers in case the originals are purloined or lost; and, in the exercise of the same authority, in case the records or files should be fraudulently or otherwise improperly altered or defaced, may direct their correction and restoration to their original condition. And in making such corrections, the clerk is under the control and authority of the court. . . . The personal knowledge of the judge is not essential to the correction of a clerical error. He may inquire into the matter and inform himself by competent evidence, and act upon that, as he acts upon proof given in court in the performance of other judicial acts."

So in Doty *v.* Rigour & Co., 9 Ohio St. 526, it was held that upon application made to the Court of Common Pleas, or notice duly given to the adverse party, an amendment of the record, in a case in which judgment had been rendered at a former term of that court, may be made under section 137 of the code, by changing the names of the drawers of the bill of exchange as expressed in the petition, so as to make the same conform in the petition to the copy thereto attached, and to the bill on which judgment was rendered; and such an amendment may be made after proceedings in error on the record may have been commenced. After the amendment in the court below, a corrected copy of the record may be obtained, and the case must be disposed of on the record so corrected.

In Corning *v.* Corning, 6 N. Y. 97, the action was for an assault and battery, and damages stated at $2,000; on a trial a verdict was rendered for $3,000 damages; the verdict was objected to by defendant, but the judge ordered the complaint to be amended by increasing the damages demanded therein to $3,000. At general term, the court reversed the order granting the amendment, ordered that the judgment be reversed and a new trial had, unless the plaintiff should remit the excess of damages over the amount stated in the complaint. The excess was remitted, and defendant went to the Court of Appeals. "Before the adoption of the code," says Jewett, J., who declared the opinion of the court, "it was well settled that the Supreme Court had no power to allow an

amendment of a declaration after verdict, by increasing the amount of damages claimed to correspond with the amount of the verdict, except upon the condition that the plaintiff relinquished the verdict, paid the defendant's costs of the trial, and consented to a new trial. Dix *v.* Dey, 3 Wend. 356; Curtiss *v.* Lawrence, 17 Johns. 111. The code has not changed this rule. The cases show also that the plaintiff had a right to enter a remittitur for the excess of damages found by the jury over and above the amount claimed by the complaint, and to enter a judgment for the amount so claimed. But if the plaintiff had made up a record, and taken judgment therein for the whole amount of the verdict, as the damages claimed by the complaint were less in amount than the verdict, it would have been erroneous. When the court at general term, on appeal, reversed the order, I think it had power, and that it was right to reverse the judgment, and to restore the plaintiff to the rights he had at the time the order was made, to remit the excess of the verdict, and to enter a judgment under the complaint for the balance, and refuse a new trial in the event of such remittitur." Pickwood *v.* Wright, 1 H. Bl. 643; 5 Halstead, 222.

A plaintiff, who obtains leave to amend his petition, must file his amendment within the time prescribed or not at all, unless further time is given. Haight *v.* Shuck, 6 Kan. 192.

In an action for the sale of real estate to pay balance of purchase money, the summons was indorsed that plaintiff demanded judgment for a certain sum and interest thereon. The defendant did not appear; the plaintiff obtained leave to amend the indorsement by adding that an order for sale of land was prayed for. The court held that the indorsement on the summons could not be amended, where there was no appearance of defendant, and reversed the judgment. Watson *v.* McCartney, 1 Neb. 132. The court said no indorsement was necessary, but that if one was made, it should be sufficiently complete to have advised the defendant of all the relief prayed for.

Where a suit was brought in the name of the Bank of Havana against Magee, and it turned out on the trial, that the Bank of Havana was not a corporation, but the name under which Charles Cook did a banking business, the court held that "when it appeared on the trial that the plaintiff's attorney had fallen into the mistake of stating the name, which Mr. Cook had given to his bank, as the creditor of Wickham and as the plaintiff in the suit, instead of his proper name, a plain case was presented for an amendment, under section 173 of the code. . . . It is apparent from the plead-

ings that the parties understood each other perfectly, as to the creditor who was seeking to impeach the conveyance to Mr. Magee. Both agreed that it was the individual or individuals transacting business under the name of the Bank of Havana, and both were equally in error in believing that the name, which was used to designate the plaintiff, was one under which the creditor might, consistently with the forms of law, prosecute his suit in court. This belief was no doubt founded on the assumption that an individual banker, issuing circulating notes pursuant to the general banking law, was a corporation. The duty of the court, when the objection was taken, was to order the pleadings to be amended. It was authorized not only to correct a mistake in the name of a party, but in any other respect, and the amendment which the case called for, would fall within either branch of that provision."

The original petition in Spice *v.* Steinruck, 14 Ohio St. 213, was for having wrongfully, maliciously, and without probable cause procured the arrest of the defendant in error, after summons served and before judgment in a civil action, and for having, in like manner, caused his arrest and imprisonment upon execution after judgment. The defendant below put in a general denial, and on the trial the plaintiff below on leave amended his petition by omitting the allegation of the want of probable cause, and alleging that the arrest was illegally made with force by the defendants below. The court then required the defendants to elect whether to withdraw a juror and to have another trial, or whether the verdict should be taken of the present jury; defendants, under protest, amended their answer, and the verdict of the jury was taken. Peck, C. J., says: "Leave to make this amendment was solicited, and allowed after all the proof had been heard by the court, and upon the alleged ground that the amended petition would conform the pleadings to the facts proved. It was a motion addressed to the sound discretion of the court which had heard the testimony, and could, therefore, determine its legal tendencies, and if, in its opinion, there was legal testimony tending to prove the case made by the petition as proposed to be amended, and that such amendment would be in furtherance of justice, it was the duty of the court, under section 137 of the code of civil procedure, to permit it to be made under such guards and restriction, as was right and proper for the protection of the defendants, provided it did not change *substantially the claim* of the plaintiff. . . . The *substantial* claim in both petitions is the same—damages for his wrongful arrest and detention under process issued at the instance

of the defendants. The *quo modo*—the precise manner, in which the wrong was inflicted, whether by the instrument of a void process, or of a process which had been abused and perverted, was of secondary importance." The court, therefore, held the amendment rightfully made, and in my opinion, the real cause of action was not changed; the only change was in the form of stating the arrest, and not in the identity of the cause of action. The amendment simply relieved the plaintiff from establishing one fact as a part of his case, and imposed upon him the duty of proving another not required by the original petition, but still it left the *real gravamen* of the complaint alike common to both. "The code," continues the judge, "abolished the varied forms of civil actions theretofore in use, and established one general form applicable alike to all causes of complaint. How, then, can it be said that an amendment, which still demands damages for the wrongful arrest set forth, and complained of in the original petition, and only varies from it in its statement of the manner in which that arrest was effected, creates such a *substantial* change in the claim, as precludes its being made under section 137. The proposed amendment was clearly in furtherance of justice." The court seem to place this amendment under section 137, which provides for amendment before or after judgment; but does it not come under section 132, which provides for amendments during the trial, in case the variance is not material under section 131? The amendment in this case was made on the trial, and was made to meet an unexpected change in the evidence in a matter not material to the real contention between the parties.

In Butcher *v.* Bank of Brownsville, 2 Kansas, 70, a motion was made to strike out the petition, because the word "petition" did not follow the names of the parties, and then leave was granted to amend by adding the word "petition;" the court held that this amendment should be allowed at any time and without *delaying* the suit; held further, that a refusal to strike out for that cause was no ground of error. The court say: "The action of the court in permitting a party to amend by inserting the word 'petition,' which had been omitted, was so manifestly correct that we need not argue it. By the code it is made necessary that the word shall follow the names of the parties to the suit in the caption. When omitted, the court should allow an amendment at any time without delaying the suit, and ought not to sustain a motion to strike it from the files without first at least giving an opportunity to amend. The court, in every stage of the action, must disregard any error

or defect in the pleadings, or proceedings, which does not affect the substantial rights of the adverse party, and no judgment shall be reversed or vacated by reason of such defect (see page 8 of code). We do not happen to see how it would affect the substantial rights of the adverse party, whether the amendment was made or not." This opinion is founded in good sense and in the spirit of the code. That absurd provision, legislating for the merest matter of form, is as bad as the old objections raised by a special demurrer. The code, which seeks to regard only the merits of a case, has introduced an immaterial matter as a matter of law, which has been more abused than any matter of special demurrer ever was. If by accident the word is omitted, a motion is made for the mere purpose of delay, and our courts grant a continuance. This decision is the correct one; it is no matter on which an issue can be taken, and hence is no ground for consideration in the preparation of an answer.

There is in England an act allowing amendments to the extent our act does. A question arose under this act under the following circumstances: An action had been brought in the name of John Clay. It was afterward discovered that John Clay was dead, and a motion made that his executors be made parties plaintiff instead of John Clay. Kelly, C. B.: "It may perhaps be regretted that the common-law procedure act has not authorized the substituting of one plaintiff for another, or one defendant for another, in a case like this; but we have no power, either at common law or by statute, to do what is asked. Since the common-law procedure act of 1852, by section 34 and following sections, in express terms enables the court to add or strike out any number of plaintiffs, and by 136th and following sections gives a similar power of allowing representatives of a deceased plaintiff to continue the suit, but contains no provision in any part of it for substituting one plaintiff for another, one suing in a representative capacity for a deceased man who never was a party, I can not but think that no such power was meant to be given."

Bramwell, B.: "I am of the same opinion. I think such a substitution was not within the intention of the act. This is not a case where it can be said that persons not formally entitled to be parties have brought an action to try certain matters perfectly well known to both sides, which is the explanation of Blake *v.* Dane, 7 H. & N. 465, and La Banca Nazionale *v.* Hamburger, 2 H. & C. 330. But here the plaintiff is altogether wrong, or rather there is no plaintiff. The man in whose name the action was brought was dead. It can not be said that this is an amendment necessary

for the purpose for determining in the existing suit the real question in controversy between the parties;' nor is this an application made between the parties to the suit, for there is no plaintiff, and therefore no existing suit, and no question in controversy between the parties. If we could see some person suing who had a beneficial interest in the claim made, though not legally entitled to sue, the case would be within the principle of the authorities cited. But the power of amendment is limited to cases where there was originally a party suing, possessed, though with a variety in legal description, of the same interest with the party to be substituted." So the court held the amendment could not be made, and the same ruling is applicable to the code. The English act goes further than our code as to substitution of parties, and hence the remark of Bramwell, B., would not be justified by our code. Our code is limited to amendments, and adding or striking out the name of any party, or by correcting a mistake in the name of a party. Here is no power of substitution of one party for another. The first clause relates to removing parties not interested in the suit, and in adding others that are necessary parties, and the last is merely changing a mistake made in the name of the real party intended. The English statute seems to go further, and allow a substitution of one party for another under certain restricted circumstances.

The English statute also authorizes amendments, so as to make the pleading conform to the evidence. An action was brought against A and B. A did not appear, and allowed the case to go by default. On the trial, it appeared by the evidence that B, who had pleaded never indebted, was solely liable, A not being a contracting party. The judge ordered the record to be amended by striking out the name of A, and directed a verdict against B. On a rule for a nonsuit, which had been reserved at the trial, the court held the amendment right. Lord Campbell said: "I am of opinion that there should be no rule in this case. The statutes giving power of amendment are most salutary remedial statutes, and ought to receive a liberal, or, at all events, a fair construction. I think that the name of the defendant was properly struck out. When the name was struck out, the judgment and everything dependent on that name became as if it never had existed."

Earle, J.: "But for the judgment by default, it is not disputed that the name of George Major Humfries ought to have been struck out; and the judgment by default may be got rid of for any reason making it just to do so."

Crampton, J.: "There can be no doubt that this case is within

the enacting part of section 37, by which a misjoinder may be amended as a variance at the trial. I find no words expressing a restriction in cases where there has been a judgment by default. We should not introduce into the statute a restriction which the legislature have not expressed, and which, I believe, they never contemplated." Greaves *v.* Humphries, 4 Ellis & Blackburn, 551; 82 E. C. L. 851.

It was clearly in furtherance of justice to strike out a name, when it was shown that the person was clearly not liable, though he had not answered. It would have been unjust to have rendered a judgment against him, when it was shown that he was in no ways liable.

In the case of May *v.* Footner, 5 E. & Bl. 508; S. C., 85 E. C. L. 505, the action was trespass for breaking a close. The dispute was as to which of two adjoining land-holders the legal title to a lane running between them belonged. On the trial it appeared that the land of plaintiff was in the possession of a tenant; and thereupon the court amended the declaration or count into one for an injury to the reversion. A motion was made under leave reserved at the trial to enter a nonsuit. Lord Campbell, C. J.: "I am of the opinion that there should be no rule in this case. Authority to amend is given to a judge at Nisi Prius by the common-law procedure act, 1854, 17 and 18 Vict., c. 125, sec. 96, which enacts that 'all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties, shall be made, if duly applied for.' Now, here the suit remains the same, though the form is altered; and the amendment was necessary for the purpose of determining the real question in controvery. There was, therefore, no excess of authority; and Mr. Smith does not suggest that any injustice will be done by this exercise of the judge's authority." Coleridge, J.: "The real question in controversy in this suit was not whether the plaintiff was reversioner or occupier of the field of which he was freeholder, but whether the spot in question was parcel of the plaintiff's freehold or not." *Vide* also 89 E. C. L. 44.

The case of Parsons *v.* Alexander, 5 E. & B. 263; S. C., 85 Eng. C. L. 262, was an action on a check on a banker, made by the defendant, and delivered to plaintiff and not paid, for money lent and on an account stated. *Pleas:* As to first count that the defendant did not make the check; as to the account stated and check, that the said accounts were stated of and concerning the [same money which formed the consideration of the] said draft or

order in the first count mentioned; and that the account was of money lost at gaming. To the residue of declaration, never indebted. On the trial before Earle, J., the judge told the jury that if the I. O. U. was given for money won by gaming, to find for defendant, which the jury did. The check was not stamped and hence could not have been given in evidence.

On an argument for a new trial, Earle, J., said: "In the present case the plaintiff sues on an account stated, proved by I. O. U. given before any check or negotiable instrument was in existence, so that the point you now raise is irrelevant." Counsel replied such is not the plea which the jury have found. Earle, J.: "I had at the trial observed the form of the pleadings, and thought the defendant was in some danger, as his second plea was not proved as pleaded. I said in the hearing of both parties that, if amendments were required, I should make them. Neither side asked for an amendment; and all parties went on as if the plea had been conformable to the actual case as appearing on the evidence. I said what I did in the interest of the defendant, whose case seemed to me such as to require a judge to give him every fair assistance. But after this was done, I think that to hold the plaintiff to the form of the plea would be giving the defendant unfair assistance." Counsel replied, the plea might, no doubt, have been amended at the trial, but it was not. Lord Campbell, Ch. J.: "The courts have now power at all times to amend all defects and errors; and it is their duty to make all such amendments as may be necessary for determining the real controversy between the parties. What passed at the trial shows that this is such an amendment; therefore, we order of our own authority, and not by consent, that the plea be *now* amended, so as to make the issue correspond to that, which was really tried before the jury." And thereupon the plea was amended by inserting the words in brackets, and the case went on for argument and decision under the gaming act, and the rule was discharged. Here the court, on a motion for a new trial, amended the pleadings so as to make them correspond with the case actually tried. *Vide* also 101 Eng. C. L. 728.

These cases will be safe guides for the court in the construction of the code, which substantially gives the same powers to our courts. These amendments were made, too, without costs, as the amendment was made simply to make the pleadings correspond with the case presented in the evidence of the parties. In such a case there are no extra costs made, and none should be charged to a party in such circumstances. It is the *duty* of the court to *order*

the amendment made, and surely no costs can be taxed to a party, when the court is bound to order the amendment; nor was a continuance granted, it being apparent to the court that the parties have really tried the real contention between them. In such a case, the court knows that no party has been misled or deceived in the issue. Parties have no right to lie by for a catch, when they and their counsel know what the real dispute is and can prepare to meet it. It is a fraud on the court, and an obstruction of justice by occupying the time of the court with two trials, when the case might have closed in one. I know such things are done, but it is no credit to any one, and the courts would do well to refuse costs, or even a continuance for the purpose of putting a stop to it.

In Lambert *v.* Mustard, 18 Ohio St. 419, it was held that it was competent for the Court of Common Pleas under section 534 of the code, part 3, to modify at a subsequent term the entry of a verdict and judgment in a civil action, so as to show that the judgment was in fact rendered on June 16, though not recorded until the 19th, so as to make a second trial bond good, which was dated on 16th, and given after the decision of the cases.

These authorities maintain the original construction given to this section in the first edition of this work; and hence the authorities which follow will be useful guides in practice as to what can and can not be done under the name of amendment.

The courts are liberal in allowing amendments at the trial in order to conform the pleading, to the evidence. Van Duyer *v.* Howe, 21 N. Y. 531; Bank of Havana *v.* Magee, 20 N. Y. 355; Hall *v.* Gould, 13 N. Y. 127; Corning *v.* Corning, 6 N. Y. 97; Wood *v.* Wood, 26 Barb. 356; Gasper *v.* Adams, 24 Ib. 287; Hunter *v.* H. River Iron and M. Co., 20 Barb. 493; Dauchy *v.* Tyler, 15 How. 399; Fox *v.* Hunt, 8 Ib. 12; Getty *v.* H. R. R. R. Co., 6 Ib. 270.

An action was commenced for false imprisonment; failing to sustain it, the plaintiff sought to amend it by adding a count for malicious prosecution; held that he could not do so. Waldheim *v.* Sickel, 1 Hilton, 45.

It is improper upon the trial for a judge or referee to allow an amendment, which will in effect amount to a new cause of action or defense. Ransom *v.* Witmore, 39 Barb. 104; Hunt *v.* Hudson Riv. Fire Ins. Co., 2 Duer, 481; Tagen *v.* Davison, 2 Duer, 153; N. Y. Marbled Iron Co. *v* Smith, 4 Duer, 362; Grosvenor *v.* Atlantic Ins. Co., 1 Bosw. 469; Union Bank *v.* Mott, 18 How. 506; Robins *v.* Richardson, 2 Bosw. 248; Ford *v.* Ford, 35 How. 326;

S. C., 53 Barb. 525; Vibbard *v.* Roderick, 51 Ib. 616; Woodruff *v.* Dickie, 5 Rob. 619; Van Syckels *v.* Perry, 3 Rob. 621; Bigalow *v.* Dunn, 53 Barb. 570; Bailey *v.* Ray, 50 Ib. 110; Van Ness *v.* Bush, 14 Abb. 36; Daguerre *v.* Orser, 3 Abb. 86; Beardsly *v.* Stover, 7 How, 294; Hagins *v.* De Hoit, 12 Ib. 322. Although a defendant waits until the trial to object to the sufficiency of a pleading, the court or referee may allow an amendment by the insertion of necessary allegations when they do not amount to a new cause of action. Woolsey *v.* Rondout, 2 Keys, 603. A referee may allow an amendment of the pleadings at his discretion. Melvin *v.* Wood, 3 Keys, 533; S. C., 4 Abb. N. S. 438; Meyer *v.* Fiegel, 34 How. 434, 438; S. C., 67 Rob. 123. In McGarry *v.* Board of Supervisors, 7 Rob. 464, it was said that a substitution on the trial of new parties defendants, could not be made, even by consent.

The provisions of section 173 (sec. 137, Ohio Code), which authorizes the amendment of pleadings after judgment, are only to be construed as permitting them for the purpose of sustaining such judgment. Englis *v.* Furnis, 3 Abb. 32; Gasper *v.* Adams, 24 Barb. 288: Williams *v.* Birch, 6 Bosw. 674.

In any case in which the court ought clearly to have allowed an amendment at special term, the court may treat the pleadings as having been amended in conformity to the proof. Bowdoin *v.* Colman, 6 Duer, 183; S. C., 3 Abb. 431; Bate *v.* Graham, 11 N. Y. 237; Clark *v.* Dales, 20 Barb. 67; Harrower *v.* Heath, 19 Ib. 338; Pratt *v.* Hudson Riv. R. R. Co., 21 N. Y. 305, 313; Wright *v.* Whiting, 40 Barb. 235. A reply, if essential, may, on motion for new trial, be filed. Smith *v.* Floyd, 18 Barb. 522.

If the complaint was not amended on the trial, but might have been, and sufficient evidence is offered to sustain a cause of action, the court will, even after trial, allow it to be amended *nunc pro tunc*. Coleman *v.* Paysted, 36 Barb. 27. See 40 N. Y. 341; Lounsbury *v.* Purdy, 18 N. Y. 515; Pratt *v.* Hud. Riv. R. R. Co., 21 N. Y. 305; Walsh *v.* Wash. Ins. Co., 32 N. Y. 427, 439.

An answer may be amended to set up usury, for it is *held* that the same rule applies to defenses denominated unconscionable as to other defenses contained in it. Catlin *v.* Gunter, 11 N. Y. 368; S. C., 10 How. 315; Brown *v.* Mitchell, 12 How. 408; S. C., 2 Abb. 481. In the case of Catlin *v.* Gunter, the court say: "We are not, I conceive, warranted in applying a different rule to the defense of usury from that which we would hold applicable in other cases. It is a defense allowed and provided by law. The defendant, in seeking to avail himself of the evidence, notwithstanding the

variance, did not claim an indulgence from the court, but simply asked for the application of those rules, which the legislature has provided for all cases indiscriminately, whether the party invoking their exercise was seeking to visit his adversary with a forfeiture or not. The law has not made any distinction between such defenses and those where no forfeiture is involved, and the court can make none. If the sense of the legislature is plainly expressed, as it seems to me to be, we have no judgment to pass upon the policy of these provisions." Harris, J., in Bates *v.* Voorhies, 7 How. 234, expressed his own opinion that usury ought to be treated as other defenses, though he thought himself bound by prior decisions. This must have been before the case of Catlin *v.* Gunter. In 12 How. 408, Brown *v.* Mitchell, the court held that when an answer set up usury, it was no ground why defendant should not have leave to amend as in other cases. Parker, J., where a default for want of an answer was opened, refused to impose the terms that the defendant should not set up the defense of usury. Grant *v.* M'Coughin, 4 How. 216. In the case of Union National Bank of Troy *v.* Bassett, 3 Abb. N. S. 359, it was held that under this section of the code the court had power to allow a defendant to amend his answer by setting up usury as a defense; that no distinction is made between defenses, provided a proper case is made. The defense of usury must rest on the same ground as any other. In the case of M'Queen *v.* Babcock, 3 Keys, 428, Grover, J., in the opinion of the court, says: "The general term correctly held that the defendant had the right to serve an amended answer twenty days after service of the original, and to include therein a new defense. Code, sec. 172; 11 How. 273, 274. This is now the settled practice of the Supreme Court. The idea that the defense of usury or of the statute of limitations was to be treated in this respect different from other defenses, has been exploded; courts now regard all legal defenses as entitled in this respect to the same consideration. The question in this case was not addressed to the favor or the discretion of the court. The defendant had a legal right to serve the amended answer." Sheldon *v.* Adams, 18 Abb. 405; S. C., 41 Barb. 54; 27 How. 179; Wood *v.* Ward, 10 West. L. Journal, 504; Rucher *v.* Hanny, 3 D. & E. 124; 3 Chit. Gen. Pr. 705; 6 Comyn's Dig. 138; Ham *v.* Goodwin, 1 Brev. 461; 6 N. H. 124; Sheets *v.* Baldwin, 12 Ohio, 120. This last case was when the leave to plead the statute was on appeal. Newson's Adm'r *v.* Ran, 18 Ohio, 240.

Vide also, on subject of amendments, Bedford *v.* Terhune, 30

N. Y. 453; S. C., 27 How. 422; 1 Daly, 371; Woodruff *v.* Dickie, 31 How. 164; S. C., 5 Rob. 619; Whitcomb *v.* Hungerford, 42 Barb. 177; Walter *v.* Bennett, 16 N. Y. 250; Morris *v.* Rexford, 18 N. Y. 557.

In the case of Hill *v.* The Supervisor, 10 Ohio St. 621, it was laid down as a rule that, where amendments are to be made by striking out, or adding an allegation to a petition, it can not be done by mutilating or altering the files. The party amending should either file a new petition or answer, or file a statement of the amendments, and designate by reference, where the new matter is to be inserted, or what is to be considered as stricken out.

There is another case to which reference ought to be had, and that is the case of Bradley *v.* Aldritch, 40 N. Y. 504. In this case it was held that in an action commenced and tried by the court as an action in equity, the plaintiff seeking therein equitable relief, and equitable only, the court, finding plaintiff not entitled to his equitable relief, can not, upon certain facts appearing on the trial which would warrant an action at law for damages, but which he had neither alleged nor claimed, assess, or cause to be assessed, such damages, and order judgment therefor against the defendant. Section 275 of the code is intended to relieve a plaintiff from any technical objection that he has not prayed for the precise relief to which it may seem he is entitled upon the trial; but still the relief granted must be consistent with the case made in the complaint. Woodruff, J., in delivering the opinion of the court, says: "It is clear that this action, begun and tried as an action in equity, seeking upon various allegations equitable relief, and equitable relief only, viz., the rescission of an agreement and the restoration of the parties to their former condition, has ended as an action on the case for deceit, and an award of damages therefor, which is 'an action for the recovery of money only.'" Code, sec. 253.

It can not be said that the defendant, by going to trial before the court without objection, waived his right to object to the trial of a mere action to recover damages for deceit without a jury, for the action was not an action for the recovery of money alone (Code, sec. 253), but for special, equitable relief, and was, therefore, triable by the court (sec. 254). He, therefore, had no alternative, and had no right to object to the trial of the cause by the court." He then shows that Scott *v.* Barlow, 24 N. Y. 40, and Geason *v.* Ketcltas, 17 N. Y. 491, do not conflict with the above views, and proceeds: "It is certain that the former practice of a court of chancery furnishes no warrant for such a proceeding. When all grounds for

equitable interposition failed, the bill was dismissed; and if a cause of action at law appeared to arise out of the transaction, which rested in no equitable, but simply in legal jurisdiction, the party was left to pursue his remedy in the appropriate forum. The code, however, in section 275, provides that the relief granted to a plaintiff, if there be no answer, can not exceed that which he shall have demanded in his complaint; but in any other case the court may grant him any relief consistent with the case made by the complaint, and embraced within the issue. This section relieves the plaintiff from any technical objection that he has not prayed for the precise relief to which, on trial, it may seem he is entitled, but the relief to be granted must still be consistent with the case made by the complaint." He then alludes to section 253, which declares that an issue of fact, in an action for the recovery of money only, must be tried by a jury, unless the jury is waived, and proceeds: "Now, it was not the intent of section 275 to violate this section, and enable a plaintiff to compel a trial by the court by merely alleging some ground for equitable relief, and, failing in that, have a trial of issues in an action for fraud and an assessment of damages therefor without a jury. Nor will it warrant the court in disappointing the expectations and claims of both parties, trying the action and deciding it, so far as it is equitable in its nature, by denying the plaintiff's claim, and then selecting of facts found, some which may warrant an action for damages, which the plaintiff has neither alleged nor claimed, and then order an assessment by a referee, and judgment for such damages as may be assessed. According to the record before us, he was not apprised of any such claim until its declaration, and its maintenance appeared in the decision of the judge; and to that he excepted, which alone he could do. The opinion of this court, in Mann *v.* Fairchild, 2 Keys, 111, is that if a party brings an equitable action even now, when the same court administers both systems of law and equity, the party must maintain his equitable action upon equitable grounds, or fail, even though he may prove a good cause of action at law on the trial. See Heywood *v.* Buffalo, 14 N. Y. 540." This case clearly shows that an equitable action can not be amended into a legal one. The report says that the court agreed unanimously that causes of action, both legal and equitable, arising out of the same transaction, may be united by proper allegations in the complaint. This may be true in theory, but as yet I have never seen such a case in fact. The courts say that the plaintiff can not state his action in more than one count.

If, then, a legal and equitable cause of action arise out of the same transaction, the pleader can not state them both without stating in a double form a cause of action. He must elect to which remedy he will resort, for he can not have both. Again, the section in regard to the trial provides no trial for a case embodying two causes of action—one at law and one in equity. It provides for the trial of *actions*, not for the trial of the different counts or causes of action embraced in the action. There are two cases when these two causes may exist: on note and mortgage and on a vendor's lien for purchase money. The code provides for this joinder, but makes the action one for the recovery of money only, so far as the trial and an appeal are concerned. But this can only be done when an action at law would lie against the defendant for the money. A mortgage alone carries with it no personal liability, unless there is a note or covenant to pay the debt. If there is a note or covenant to pay, the one is a legal cause of action, the other exclusively equitable. With these exceptions, I do not now recollect any other cases where two causes of action, the one equitable and the other legal, can grow out of the same transaction. Out of a sale of real estate there may be two causes of action—one equitable for a specific performance, the other legal for damages for refusing to execute the agreement; but these can not be united. The party can have but one of these remedies, and he must elect to which he will resort. There may be cases of this kind, but there is here no question of joinder, but of election.

The whole power is discretionary, and therefore not subject to the revision of a higher court. Error does not lie for what is matter of discretion in the court below. French *v.* Stanley, 21 Maine, 512; Emerson *v.* Paine, 9 Vt. 271; Jenkins *v.* Brown, 22 Wend. 454; P. and M. Bank *v.* Willis, 5 Ala. 770; Roberts *v.* Austin, 5 Whart. 313; Evans *v.* St. Johns, 9 Port. 186; Anderson *v* Hamer, 5 How. (Miss.) 525. A motion to strike out a plea is addressed to the discretion of the court, and is not revisable in error. Townson *v.* Moore, 9 Port. 136. Matters of practice in courts below are not the subject of revision by writ of error. Sisco *v.* Harmon, 9 Vt. 129. So where the mode of examining a witness is a matter of discretion, allowing leading questions, and permitting a witness to be recalled to restate his testimony, etc., the decision can not be revised on error. Mattocks *v.* Stearns, 9 Vt. 326; Hopkinson *v.* Steel, 12 Ib. 582; The People *v.* Rector, 19 Wend. 569; Sanders *v.* Johnson, 6 Blackf. 50. So a motion to continue, granted or refused, can not be revised. Small *v.* Anderson, 2 Monroe, 56. So

a motion to amend is one of discretion and can not be revised. Warren *v.* McHatten, 2 Scam. 32; 7 Mo. 567; 14 Vt. 159; 4 Dana, 264; 5 N. H. 105; 1 Watts & Serg. 240.

This section, then, vests in a single judge an absolute, unconditional power to do with the pleadings and record of a case just as he pleases, and on just such terms as he may think proper. He may commit as many errors as he pleases, and then amend the party out of the benefit of them. The only limitation on his discretion is in conforming the pleading or proceeding to the facts proved, when this amendment does not substantially change the claim or defense. And such is the construction given to this section in New York, by Harris, J., in Beardsley *v.* Stover, 7 Pr. 294. "Before the recent amendments of the code," says the judge, "there would have been some difficulty in allowing the proposed defense to be inserted in the answer. By the terms of section 173, the court could only allow such amendments as would not change substantially the claim or defense. But by a very slight change in the language of the section, this restriction, which before was general, is now limited to those cases in which amendments are allowed for the purpose of conforming the pleading to the facts proved. In all other cases I understand the court to be invested with the power, *in its discretion*, to allow any allegations material to the case to be inserted in the pleading, even though the effect may be to change entirely the cause of action or defense."

This opinion is in conformity with the literal language of the code, and unless there are some other restrictions upon the will of the court than what the code contains, we verily have the strange anomaly of a court of law without any law, so far as this important subject is concerned, but its own unbridled will. It can grant to one what it denies to another, and its action can not be controlled. But is it true that a court can be endowed with any such discretion? That men's rights and remedies can thus be tampered with by a judge, even with the sanction of law? We think not.

The constitution secures to all the right of enjoying and defending life and liberty, acquiring, possessing and protecting property, and seeking and obtaining happiness and safety, Const., art. 1., sec. 1; and all courts shall be open, and every person, for an injury done him in his lands, goods, person, or reputation, shall have remedy by *due course of law*, and justice administered without delay. Const., art. 1, sec. 16. Nor shall any power of suspending laws ever be exercised except by the General Assembly. Sec. 18.

These clauses are the great guaranties of the constitution in

favor of individual rights and liberty against legislative and judicial discretion. It will be admitted, it is presumed, that no judgment can be rendered against a person in an action to which he is not a party; and yet the code authorizes the court to strike out and insert names after judgment. Is it possible that, under a government of law, any court can be empowered to exercise any such discretion? Every party must have his day in court, his right to answer any claim that may be set up against him; but if he can be made a party to a judgment already rendered, because he ought originally to have been made a party to the action, then he is concluded as to the amount by a trial with which he had no right to interfere, and in which he could not be heard. There is, then, no possible case where the name of a person can be inserted in a record after the rendition of a judgment, without violating the plainest principles of common justice, and the well-settled constitutional law of the land. The party has a right to be heard upon every question arising in the progress of a case, by a decision of which he is in any wise to be affected. In D'Arcy *v.* Ketchum et al., 11 How. U. S. 165, a judgment rendered against one not served with process was held void. By the general law of the land, no court is authorized to render a judgment or decree against any one, or his estate, until after due notice by service of process, to appear and defend. This principle is dictated by natural justice, and is only to be departed from in cases expressly warranted by law and excepted out of the general rule. Hollingsworth *v.* Barbour, 4 Peters, 466; 5 Johns. 37; 3 Wils. 297; 9 East, 192; 8 Johns. 86.

No more can a name be stricken out after judgment; because the plaintiff's rights are then settled by the judgment, and they can not be changed, except by some process known to the law. On error, a judgment can be reversed; but if there is no error in the record, what right or power has a court to deprive the plaintiff of a judgment against one party to it? Indeed, the jurisdiction of the court over the case is gone before such an amendment can be made. On the rendition of the judgment, the case is at an end, and out of court, and so also are the parties. There seems to be no principle on which the right to any such power can rest. Our own courts have recognized all this as law. In Keller *v.* Com. Pick. Co., 1 Ohio, 375, the court held that a judgment could not be amended, save in mere matters of form. An error clearly clerical may be amended. Hamner *v.* McConnell, 2 Ohio, 31. Where service was had only on one, and the clerk by mistake en-

tered up judgment against both, this can be corrected. Ib.; Torbet *v.* Coffin, 6 Ohio, 274. The whole extent of the power of the court to amend a record was limited to cases where the whole record showed what the error was, and that it was a mere clerical one. State *v.* Smith, 1 Nott & McCord, 16; Gay *v.* Caldwell, Hardin, 64; 6 Mon. 341; 7 Cowen, 344; 3 Ib. 43, note; 1 Pick. 351.

Nor can such an amendment be made without notice to the adverse party. 5 How. (Miss.) 173; 1 Smede & Marsh. 391; Reynolds *v.* Stansbury et al., 20 Ohio, 344; 15 Johns. 588.

This section, therefore, must be held to confer no other power than the courts before possessed as to amendments of records, either in changing parties, or in any other particular changing the record.

There is another limitation to be placed upon this power. The parties to the action can not be changed so as to get rid of the original plaintiffs or defendants. Section 116 provides that the *title* of a cause shall not be changed in any of its stages. Surely if parties can be changed without limitation, it is absurd to retain the title of a cause which no longer indicates its real parties. This section clearly shows that the legislature never supposed that the parties to an action could be substantially changed. The subject matter, and the original parties to an action, should never be so changed as in substance to make it a new action.

In actions at law, the parties and the contract or right settle the character of the action. If the plaintiffs aver that they made a contract with certain defendants, can they be permitted so to change the action as to bring in new plaintiffs or new defendants? If so, this is to make a new action; to set forth a new contract. Where the defendants are a firm, and plead in abatement that another made the contract with them, then a summons may issue for that party, and he be brought in; because it is a plea in abatement, and admits the contract as that of a firm, but avers that there has been a mistake as to its members. It does not contradict the case originally made in the petition. But to permit a plaintiff to aver a contract made with himself, and then to amend it into a contract made with himself and others, is to permit him to commence a new action on a new contract.

The word *amend* implies that something exists to amend, and that the amendment is an improvement of something already existing. Here is an action founded upon a cause of action; that is the existing matter, and that may be improved by an amendment;

but that which is equivalent to creating a new action is no amendment; it is the creation of a new action. It is necessary to keep this idea in view; otherwise, under the name of an amendment, new actions will be commenced. This view of the code at first became impressed upon some minds from the sweeping language of this section. A married woman, in the absence of her husband in California, brought suit in her own name; it was appealed to the Court of Common Pleas, and a motion was there made to substitute the name of the husband for that of the wife; and this was gravely urged as an amendment. But what was this but the beginning of a new suit? Here was a mistake as to the person who ought to be plaintiff. Can such a mistake be corrected by an amendment? If so, there is no necessity to be particular as to who are plaintiffs; as, if the person who brings the suit has no cause of action, he may find some other one who has, and bring him in by amendment. Is this giving one a remedy by due course of law? There is no law about it; it is the pure discretion of a judge.

Again: It is a grave question whether the legislature can authorize a court to suspend the law. This code points out how a suit must be commenced; how the cause of action and the defense must be stated; and is it possible that the legislature designed to repeal all this, or to allow a judge to suspend its application to such cases as he may choose? Is this the due administration of justice? This certainly can not be extended so far as to enable one, under the pretense of an amendment, to commence a new action?

Where the *subject* of the suit is the matter of jurisdiction, and the court are called upon to make a title to it to a purchaser under its decree, in such a case the court will refuse to act until all parties interested in the property are before the court. The plaintiff must make all others interested, defendants; he can not make them plaintiffs against their consent. In these proceedings *in rem* the rule in chancery must prevail; but this rule is not applicable to personal actions for the recovery of money, whether as a debt or damages. In such actions there is no subject to be disposed of; no property the title of which is to be transferred. The plaintiff has brought his action, and stated the grounds of it, and can he depart from it without in effect commencing a new action?

The very last clause, where the discretion is limited, looks to this construction. The pleadings can not be made to conform to the proof, if in so doing the claim or defense is substantially changed. Why should there be a distinction here, if the legislature intended to give any such unlimited discretion over the pleadings and the

record? When the parties have alleged one case and proved another, why not amend them into harmony, if you can by amendment wholly change the cause of action and the parties?

We conclude, therefore, that the identity of the action can not be changed by an amendment, whether in regard to the cause of the action or the parties to it. Where the action is founded on a legal right, this rule must be strictly applied; in chancery cases the rule heretofore prevailing in courts of equity will still prevail, and be liberally applied to cases *in rem* or in equity. No other construction can be given to the section without unsettling all certainty in the administration of justice, and all uniformity in the practice of courts; since such practice will be but the individual discretion of the court or judge; whereas a court must have rules even for the exercise of its discretion, so that it may mete out to all the same administration of the law.

Section 139 seems to recognize this principle of limitation. After a demurrer has been sustained, the adverse party may be permitted to amend, if the defect can be remedied by *way of amendment*. If a new case could be introduced by an amendment, there would be no difficulty in remedying almost any defect; so the phrase, *by way of amendment*, seems to imply that this way of amendment is not a way in which everything can be done; that it is not a way to commence new suits or introduce new causes of action.

This section seems to have been framed under the vague notion that the power of amendment should be made just as comprehensive as it could be made; but the court still has to construe it in relation to its own powers and the other provisions of the code. The very words, *in furtherance of justice*, convey an insinuation that this section must not be taken too literally; that it must be limited to cases where it is in *furtherance of justice*. These words either mean something or they mean nothing. They mean nothing if the opinion of the judge is to be the sole standard whether the amendment is in furtherance of justice or not. Such is the opinion of Mr. Justice Harris, in Beardsley *v.* Stover, 7 Pr. 294. His language is: "In this case, I think it may be in furtherance of justice to allow the defendant to amend," etc. In his view, what he thinks is in furtherance of justice, is so. With this view of the law there is no rule as to amendments, save the whim of each judge on each case as it may arise. We all know that in such a state of the law, there never can be any uniformity or certainty.

But it is believed that these words, *in furtherance of justice*, mean something. They are not to be disregarded as meaningless, unless

no meaning can be given to them. The statute does not say that a court may amend at its discretion. That is Judge Harris' construction of it. What then do these terms mean?

The courts had already recognized certain rules upon which amendments might be made, and these rules are evidence of what amendments are in furtherance of justice. A writ issued without a seal is not amendable. Witherell *v.* Randall, 30 Maine, 168; Bailey *v.* Smith, 12 Ib. 196; Tibbets *v.* Shaw, 19 Ib. 204. The reason is plain—the writ is void. Boal's Lessee *v.* King et al., 6 Ohio, 11; Bailey *v.* Smith, 12 Maine, 196; Hall *v.* Jones, 9 Pick. 446. To amend a void proceeding into a valid one can never be in *furtherance of justice*, until law is considered no longer obligatory; and the law regulating the practice of the courts is just as obligatory as any other law.

So it has been always held that a new cause of action can not be introduced by way of amendment. Thompson *v.* Phelon, 2 Foster (N. H.), 339. So it was held that a declaration containing a count for work and labor could not be amended, by inserting counts for use and occupation, and for goods sold and delivered. Ib. A count on a note for specific articles can not be admitted as an amendment to a declaration containing only a count for money had and received. French *v.* Gerrish, 2 Foster (N. H.), 97. In Lawrence *v.* Langley, 14 N. H. 70, the court says: "The amendment in question was improperly admitted. By it a new and different cause of action was introduced into the declaration. In the original count the ground of action is the liability of the defendant as the indorser of a note, while the promise alleged in the amended count is based upon the sale of the stage property to the defendant. The contracts set forth in the two counts are therefore not the same." In Butterfield *v.* Harvell, 3 N. H. 201, the following language is held: "Notwithstanding the *liberal* construction given by courts, in modern times, to statutes of amendments, and the general provisions of our statute (1 N. H. Laws, 99), that courts may grant amendments, 'where the person or case may be rightly understood or intended,' it is a well-settled principle, that no amendment of a declaration inconsistent with the nature of that declaration, or which changes the cause of action, comes within the provision of the statute, or can be admitted." So a note having been received as payment of an account, and an action having been brought for the goods sold, the court held that the note, being a new cause of action, could not be introduced into

the declaration by way of amendment. Newall *v.* Hussey, 18 Maine, 249.

Amendments may be permitted when they do not introduce a new cause of action. In Stevenson *v.* Mudgett, 10 N. H. 338, the rule is thus stated: "An amendment which changes the alleged date of a contract, or the sum to be paid, or any particular of the matter to be performed, or the time or manner of performance, changes in one sense the cause of action; but it is not in this sense that the rule is to be understood. Amendments of that character, so long as the identity of the matter upon which the action is founded is preserved, are admissible; the alteration being made, not to enable the plaintiff to recover for another matter than that for which he originally brought his action, but to cure an imperfect or erroneous statement of the subject matter, upon which the action was in fact founded. So long as the court can see that the identity of the cause of action is preserved, the particular allegations of the declaration may be changed and others superadded, in order to cure imperfections and mistakes in the manner of stating the plaintiff's case." The same doctrine is also asserted by the same court in Merrill *v.* Russell, 12 N. H. 74. The court there says: "And the rule prohibiting amendments only, prohibits such as would allow a party to recover for a cause of action other than that for which the party brought his action, and not such as constitute merely a more perfect and complete statement of the particulars of the matter constituting the cause of action originally set out." So a new count for the assertion of a right, or the enforcement of a claim, growing out of the same transaction, act, agreement, or contract, upon which the original declaration is founded, is not for a new cause of action, and may be inserted as an amendment, however different the form of liability may be. Smith *v.* Palmer, 6 Cush. 513. *Vide* also Cobarga *v.* Seeger, 17 Penn. St. 514; Loring *v.* Proctor, 26 Maine, 18; 30 Maine, 30.

The basis of this rule is plain; it is not just to the defendant to permit a party who can not recover for what he sues, to recover by means of a new cause of action, surreptitiously slipped in under the pretense of an amendment. Such an amendment can not be in *furtherance of justice.* Justice is the application of a law to a case. The law points out how actions shall be commenced; requires a petition stating the facts of the case, and other proceedings specifically provided for in the code. This whole law is got rid of, if a party can commence a suit for one thing, and try his case for

another. There can be no justice in such a proceeding. Penny *v.* Parham, 1 La. Ann. 274.

A party may be permitted to amend by diminishing the amount of what he claims. In Smith *v.* Brown, 14 N. H. 67, a plaintiff in an action of trover was permitted to strike out the name of a defendant. The reason is obvious—a verdict might have been found in his favor without discharging the others. Fitch *v.* Stevens, 2 Met. 505. So a count may be struck out, of which the court has no jurisdiction. Pollard *v.* Barnes, 2 Cush. 191; 29 Maine, 123; Wight *v.* Stiles, 29 Ib. 164.

So amendments may be made, supplying certain mere formal deficiencies. A complaint may be amended in the amount claimed in an action on a contract for money. Merchant *v.* N. York Life Ins. Co., 2 Sandf. S. C. 669. So where, in a real action, the plaintiff proves title to a less quantity than he has claimed, he may amend and recover according to his proof. Kellogg *v.* Kellogg, 6 Barb. S. C. 116.

A writ may be amended where there is sufficient expressed to determine with certainty the nature and object of the process. Dean *v.* Smith, 11 Vt. 331; Bartholomew *v.* Chatauqua Bank, 19 Wend. 99; Fitzgerald *v.* Garvin, T. U. P. Charlton, 281. The name of the State may be inserted if it has been omitted. Harris *v.* Jenks, 2 Scam. 475. The State is clearly shown by the court from which the writ issues. But the amendment of an execution will not be permitted, when such amendment will prejudice the rights of third persons. Cape Fear Bank *v.* Williamson, 2 Iredell, 147. And, if amended, the court will disregard it in its retroactive effect, where the rights of others are to be affected. Ohio Life Ins. & T. Co. *v.* Urb. Life Ins. Co., 13 Ohio, 220.

The true test seems to be this: Is the writ void? If it is, it can not be amended. Wood *v.* Hill, 5 N. H. 229; Bell *v.* Austin, 13 Pick. 90; Cramer *v.* Van Alstyne, 9 Johns. 386; Kyler *v.* Ford, 2 Rand. 1; S. P., 2 Penn. 632; 1 Mon. 146; Hall *v.* Jones, 9 Pick. 446; Chandler *v.* Bricknell, 4 Cowen, 49; Burk *v.* Barnard, 4 Johns. 309; 4 Cowen, 548; 2 Johns. 190. But where the writ is only voidable there it may be amended. Jones *v.* Cook, 1 Cowen, 309; Vandeusen *v.* Brower, 6 Cowen, 50; 16 Johns. 145.

A record may be amended after the case is out of court, if there is anything to amend by, Hardin, 64; as a mistake in transposing parties' names, Bowman *v.* Green, 6 Mon. 341; 2 Penn. 1012; or a mistake in the party for whom judgment is rendered. Marsh *v.* Perry, 7 Cowen, 344; 3 Cowen, 43, note; 4 Conn. 71. The judge

can not do it from his own knowledge of the facts, State *v.* Smith, 1 Nott & McCord, 16; Peck, 140; nor by the minutes of the judge. Dickson *v.* Hoff, 3 How. (Miss.) 165. The errors must be mere clerical errors, and appear to be such from an inspection of the balance of the record, or they can not be amended. The solemn record of a court can not be changed on any evidence whatever outside of the record. This is the rule universally recognized. Smith *v.* Branch Bank, 5 Ala. 26; 1 Scam. 122; 4 Humph. 43; Armstrong *v.* Robertson, 2 Ala. 164; 1 Story, 310; 9 Port. 252, 186; 4 Leigh, 308; 6 Blackf. 246; 1 Penn. St. 320; Green *v.* Dodge, 3 Ohio, 486; 1 Ohio, 375; 2 Va. Cases, 527; Hull *v.* Williams, 10 Maine, 278; 1 Dev. & Bat. 374; 6 Call, 12; 5 Watts, 186. On error for that the person having the legal interest is not made plaintiff; the record can not be corrected by way of amendment. Frankem *v.* Trimble, 5 Barr, 520.

These various rules regulating judicial discretion in matters of amendment are all founded on the principles of justice and law. A judgment can not be amended so as to change its character; because it is the highest evidence of a fact known to the law; hence it is not legally capable of being proved to be incorrect. The other rules are equally founded in principles of justice, and can not be violated without being against the furtherance of justice, and therefore against the very wording of the statute. Those words do mean something, and do limit the discretion of the court by those plain rules of common honesty and justice and law which prohibit a judge from acting arbitrarily in any case. What amendments are in furtherance of justice must be settled by the practice of the courts, and can be settled in no other way.

IV. *Correction of Mistakes.*

Sec. 138. The court in every stage of an action must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect.

Where an affidavit to obtain an order of arrest was entitled "in the cause," before the action was commenced, it was held to be a defect not affecting the substantial rights of the adverse party, and might be disregarded. Pindar *v.* Black, 4 Pr. 95. An answer was entitled "in the Supreme Court," instead of "Superior Court." The error could be disregarded. William *v.* Sholto, 4 Sand. S. C. 641. Where a demurrer was stricken out as frivolous, and judg-

ment entered as on a default, and no entry had been made of the motion and judgment, the court held that it would disregard this clerical error. Whitehead *v.* Pearce et al., 9 Pr. 35; Simmons *v.* Sisson, 26 N. Y. 264; Phelps *v.* McDonald, 26 N. Y. 82; Grant *v.* Morse, 22 N. Y. 323. Judgments are not reversed because the facts found by a referee or judge do not affirmatively sustain them. On the contrary, the judgment of subordinate courts are presumed to be right, unless it appears that a rule of law has been violated after assuming that the facts have been viewed in the most favorable light which the case will admit of.

V. *Variance.*

SEC. 131. No variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice, in maintaining his action or defense on the merits. 2 Ohio St. 131, 562, 569; 4 Ib. 542; 7 Ib. 310; 10 Ib. 621.

Whenever it is alleged that a party has been so misled, that fact must be proved to the satisfaction of the court, and it must also be shown in what respects he has been misled.

The court may thereupon order the pleading to be amended upon such terms as may be just.

This definition of a variance is anything but definite, and is open to the same objection that so much of the code is open to—that of vesting *unlimited discretion;* the codifiers, in fact, did not seem to know whether their code would work well or ill. Hence, after the most exact details, the whole is rendered inoperative by a provision which permits the judge to insist upon the provisions of the code or not, as he sees fit—a discretion with which no good judge would wish to be clothed.

The test seems to be one of fact, not of principle. Was the adverse party misled, and that to his prejudice? The code here, therefore, provides for a quarrel between counsel and the court on an incidental question of fact, arising during the trial. What is a variance in law is easily determined; whether a party has been misled is not so easy to determine.

The court must, however, have some rule in regard to the matter, if it wishes to administer the same law to all parties. And this rule must be this: If the defendant shall make affidavit, or if his counsel shall file his professional statement that he has been misled to the prejudice of the adverse party, the court must take

such to be the fact. It will never answer to permit an inquiry upon evidence to ascertain the fact; such a course would lead to endless confusion. There may be cases so plain that no one could be misled by the variance; in that case the court would, as a matter of law, decide that no one could be misled by such a variance; but in all other cases, the fact must be ascertained in the way above indicated. The prayer for relief, it seems, would be a variance not calculated to mislead one. Getty *v.* H. R. R. Co., 6 Pr. 270.

Where the variance is material, the court must give leave to amend upon such terms as may be just. These terms must be on the payment of costs, if the amendment works a continuance of the case. It would not be just to burden the other party with the costs of two trials, for a fault of the party guilty of mispleading.

It is often difficult to settle what is a variance. Where the declaration alleged that the plaintiff was entitled to a *public alley*, it was held that proof of a *private alley* did not sustain the averment. So, where in a bill in chancery it was stated that the agent of plaintiff bought and took a conveyance of certain lands, and paid for the same with their judgment, and the proof showed that the agent paid one-half of the price with his own money, it was held to be a fatal variance, and not having been amended before hearing, it could not now be done on a bill of review. Reynolds *v.* Morris, 7 Ohio St. 310. "That *the allegata* and *probata* must substantially agree in proceedings in equity as well as at law," say the court, "is a doctrine too familiar and well settled to require the support of authority. Proof without allegation is as ineffectual as allegation without proof." Hunt *v.* Daniel, 6 J. J. Marsh. 404. There is no dispute or uncertainty as to the rule; the only difficulty, if there be any, is in respect to its application in the case before us. In Delle *v.* Woods, 14 Ohio, 126, it is said: "The bill alleges an agreement to convey to each of the children. The proof sustains a decree to convey to two only. By the *allegata* of the bill, all the complainants had a joint right to pursue an interest in the land, and to have a joint decree for the title. By the proof, the girls were to have a claim for something against John and William, who alone were to have the title. The point was not particularly brought to our attention on the original hearing, and the question escaped a critical examination. It is, nevertheless, fatal to the decree. The proofs and allegations, in chancery as well as at law, must correspond."

In Libbey *v.* Hodgdon, 7 N. H. 394, it is said: "The plaintiff

has set up a contract for an absolute conveyance of certain lands; this is part of an entire contract; in evidence, it appears to have been subject to certain exceptions and reservations. We think the variance is substantial."

"It is true that there were cases brought distinctly upon and for the specific performance of contracts; and are, therefore, distinguishable from the case before us, which is not brought upon the contract in respect to which the variance occurs, but is brought to enforce a resulting trust arising out of a contract in reference to lands, made between the defendant and a third person. But the case of Clements *v.* Kellogg, 1 Ala. 330, bears a very close analogy to the case at bar, and seems to be conclusive to the effect that where a resulting trust is claimed by reason of a contract, or title material to be alleged, a variance between the contract or title alleged and proved, is fatal. That was a bill in chancery brought by a minor daughter of Theron Kellogg, deceased, by her next friend, against Joshua Clements, seeking to compel him to account for the profits arising from the occupancy by Clements, in his lifetime, of "six thousand four hundred *arpens* of land and a saw-mill," of which Clements and the complainant's father were in his lifetime tenants in common. The proof was that Clements occupied "six hundred and forty acres and saw-mill," of which the complainant's father was the sole proprietor. The variance was held to be fatal."

In Hill *v.* Supervisor, 10 Ohio St. 621, the court say: "Although the language of pleadings under the code will be construed according to its popular and ordinary meaning, that meaning must conform substantially to the proof on the trial. Proof that the defendant erected a stone fence fifteen rods from a road, causing water to flow upon and obstruct a road, can not be received where the cause of action alleged in the petition is that the defendant erected a fence across the road, thereby obstructing it. The petition should be amended in such a case, if the testimony is objected to by the defendant, whether he would be misled or not by the variance."

Since the above was written the 21 Ohio St. has come to hand, in which is found a decision on a question of variance. The case is that of Thatcher *v.* Heisey, 21 Ohio St. 668. This is the whole case as found in the report:

By the court: The petition stated that the plaintiff performed work and labor for the defendant on his mill-dam. The evidence offered by the plaintiff and admitted by the court, was that the

plaintiff performed work and labor for the defendant in his harvest field, helping him to harvest his grain. *Held*, that the variance between the petition and the evidence was material, and the evidence should not have been admitted, although the defendant neither alleged nor offered to prove that he had been misled in any respect by the variance. Hill *v.* Supervisor, 10 Ohio St. 621, 622, proposition 4, followed and approved. Judgment reversed and cause remanded.

SEC. 132. When the variance is not material, within the meaning of section 131, the court may direct the fact to be found according to the evidence, and order the immediate amendment, so as to make the pleading conform to the proof, without costs.

This section undertakes to qualify section 131. When, however, the allegation of the claim or defense, to which the proof is directed, is unproved, not in some particular or particulars only, but in its general scope and meaning, it is not deemed a case of variance within the last two sections, but a failure of proof.

In this latter case, it would seem that no amendment could be made. The two preceding sections provide when and how variances disclosed on a trial may be amended. This section declares that the class here mentioned can not be amended under those two sections, and if not amendable under those, they are not of course amendable at all.

This section also throws light on the extent of the general powers of amendment under section 137. The case provided for in section 133 is the case where one cause of action is stated, and another proved; and in these cases no amendment can be had. And why? Because it would be to substitute one cause of action for another, and thus to commence a new action under the false pretense of an amendment. This the code does not permit; because if it intended to permit it to be done before a trial, there is the same reason for permitting it to be done after a trial. The amendments are to be limited to cases where the amendment does not change the cause of action, but only supplies imperfections and omissions in setting it out.

Where the statement is larger than the proof, that constitutes a *variance;* but where the proof exceeds the statement, it is no variance. Marryat *arguendo* in Mountstephen *v.* Brook, 1 B. & Ad. 255.

The proper time to raise the question of variance is when the party has rested his case. 15 Ga. 210; 3 Hill, 237; 5 Wend. 301.

In an action on a contract, there is no variance between the allegation of a sole liability and proof of a joint undertaking by the defendant and another. Carter *v.* Hope, 10 Barb. S. C. 180. The defendant must plead the non-joinder in abatement, otherwise he can not take advantage of it. Such has been the law since Lord Mansfield's time. Fay *v.* Grimstead, 10 Barb. S. C. 321.

Redundant and Irrelevant Matter.

SEC. 118. If redundant or irrelevant matter be inserted in any pleading, it may be stricken out on motion of the party prejudiced thereby.

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1. *What is redundant and irrelevant matter?*—By *redundant* matter must be meant averments, which, though they relate to the subject matter of the action, are not yet necessary to the plaintiff's right to recover.

Irrelevant matter must be such as has no relation to the case made; and is what in chancery would have been called *impertinent* or *frivolous*. The redundant matter must be such as can be stricken out, and yet leave a complete cause of action. The same is also true of impertinent matter; because, if after the matter objected to is stricken out there is not left a good cause of action, the remedy is by demurrer. 8 Pr. 149; Fabricolti *v.* Launity, 1 Code, N. S. 121. An entire complaint can not be stricken out as irrelevant or redundant. Benedict *v.* Dake, 6 Pr. 352.

If the matter in an answer can have any influence upon the decision of the cause, it is not impertinent. 4 Paige Ch. 174. The same rule will apply here. "The motion to strike out redundant or irrelevant matter is analogous to a demurrer, and should, I think, be decided on the same principles. If the matter can not be made the subject of a material issue, it has no business in the pleading, and ought not to be left there to embarrass the opposite party and the court. Any matter which upon exceptions for impertinence under the chancery practice would be struck out as unnecessary or impertinent, should, on motion, be struck out as redundant or irrelevant." Per Harris, J., R. & W. Plank R. Co. *v.* Wetzel, 6 Pr. 68. Matter is *irrelevant* in a pleading which has no bearing on the subject matter of the controversy, and can not affect the decision of the court. Fabricolti *v.* Launity, 1 Code, N. S. 121. Irrelevant or redundant matter must be such as can not be

reached by demurrer. White *v.* Kidd, 4 Pr. 68; Esmond *v.* Van Benschoten, 5 Pr. 44; Hull *v.* Smith, 8 Pr. 149. By *irrelevant* or *redundant* in the code, I take it, is meant what is usually understood as *impertinent;* for a pleading in equity is impertinent when it is stuffed with long recitals or long digressions, which are altogether unnecessary and totally immaterial to the matter in hand. 1 Barb. Ch. Pr. 41; Woods *v.* Mond, 1 Johns. Ch. 106. It is surplusage at law, According to Webster, *redundant* means superfluous, more than is necessary, superabundant; and *irrelevant*, not applicable, or pertinent, not serving to support. Both, therefore, may probably come under the head of impertinence. Prolixity may become redundance, and Lord Eldon held that needless prolixity was in itself impertinence. See 4 Edw. Ch. 426. Per Hand, J., Carpenter *v.* West, 5 Pr. 53. *Vide* also Averill *v.* Taylor, 5 Pr. 476; 8 Ib. 149.

It has been made a question whether the code authorizes the striking out every redundant or irrelevant matter. Hynds *v.* Griswold, 4 Pr. 69; White *v.* Kidd, 4 Ib. 68; But Hand, J., in Carpenter *v.* West, 5 Pr. 53, doubts the propriety of such a restriction. "It has been thought," he says, "irrelevant and redundant matter should not be stricken out unless a party is aggrieved or prejudiced thereby. With deference, I doubt that this is so to the fullest extent. As to scandalous matter, it is not clear that a person not a party to the record may not move to strike it out. Coffin *v.* Cooper, 6 Ves. Jr. 514; Williams *v.* Douglass, 5 Beavan, 82; Ex parte Simpson, 15 Ves. Jr. 447; 5 Ib. 656, note. And the court, it seems, will do it without application of any one. And impertinence in an answer was always exceptional. My own impressions are, that as to scandalous and impertinent, irrelevant and redundant matter, the code has not in any respect changed the former practice in equity cases. See Shaw *v.* Jayne, 4 Pr. 119; Knowles *v.* Gee, Ib. 317. Its effect on what before the code would have been a case at law is now under consideration. If this view is correct, the adverse party may always be considered aggrieved by scandalous, irrelevant, impertinent, and redundant matter in pleading. I think one may be considered aggrieved by the interpolation of matter foreign to the cause into the pleadings in a cause in which he is a party; and he always had a right to have the record expurgated for that reason, without reference to the question of costs. St. John *v.* St. John, 11 Ves. Jr. 526. A few unnecessary words will not make a pleading impertinent. Del. Port *v.* De Tastel, 1 Turn. & Rus. 486; Des Places *v.* Garris, 1 Edw. Ch. 350. And

courts should be liberal, especially until our novel system of pleading shall have become better settled and understood. Every fact, direct or collateral, tending to sustain the general allegations of the bill, may be inserted, if done in a proper manner . Hawley *v.* Wolverton, 5 Paige Ch. 522; Perry *v.* Perry, 1 Barb. Ch. 519." This opinion is undoubtedly the better law. Neither party has a right to swell the record with irrelevant and redundant matter at the expense of some one else. Nor has a party a right to introduce immaterial issues to the confusion of the opposite party. He has a right to a naked case, and he is bound to answer nothing more. Indeed, the code assumes that such matter is to be stricken out on the motion of the party prejudiced thereby. It is not that such redundant and irrelevant matter as prejudices one may be stricken out; but it is to be stricken out by the prejudiced party.

A demurrer will not meet a case when the pleading contains redundant or irrelevant matter. Davies, J., in Smith *v.* Countryman, 30 N. Y. 655, 668, says: "If the new matter set up by the defendant, as constituting a defense, was sham or irrelevant, it was the duty of the plaintiff to have moved on notice to strike it out. Code, sec. 152. If the new matter did not, upon its face, constitute a defense, it was the duty of the plaintiff to have demurred to it. Code, sec. 152. The practice resorted to in this case, to correct the pleadings by motion at the trial, is not warranted by the code, and should not be encouraged." This objection as to irrelevant or redundant matter admits that there is enough in the petition to constitute a cause of action, and in the answer enough to constitute a defense; hence a demurrer will not lie to either. The remarks of Marvin, J., in The People *v.* Ryder, 12 N. Y. 433, 437, well illustrate what is redundant or irrelevant matter. "The code," he says, "requires that the complaint should contain a plain and concise statement of *facts* constituting a cause of action without unnecessary repetition. Sec. 142. This rule is substantially as it existed prior to its enactment in actions at law. Chitty says, in general, whatever circumstances are necessary to constitute the cause of complaint or ground of defense must be stated in the pleadings, and all beyond is surplusage; *facts* only are to be stated, and not arguments or inferences, or matter of law, in which respect the pleadings at law appear to differ materially from those in equity. 1 Chit. Pl. 245. At page 266, he says it is a most important principle of the law of pleading that in alleging the *fact* it is unnecessary to state such circumstances as merely tend to prove the truth of it. The dry allegation of the fact, without detailing a va-

riety of minute circumstances which constitute the evidence of it, will suffice. The object of the pleadings is to arrive at a specific issue upon a given and material fact; and this is attained, although the evidence of such fact to be laid before the jury be not specifically developed in the pleadings. And see Firth *v.* Thrush, 8 B. & C. 387; Dyett *v.* Pendleton, 8 Cowen, 728." All else but this naked fact is redundant and irrelevant; it has nothing to do with the issue to be come at, and hence should be stricken out as calculated to mislead the jury and give trouble to the court in separating what is material from what is immaterial.

If evidence is stated and not denied, its truth is not admitted. Issue can not be taken on what is mere evidence; much less upon wholly immaterial matter.

2. *When the motion must be made.*—The motion must be made at the first opportunity; before the answer, if it is contained in the petition, and before a reply, if contained in the answer. Isham *v.* Williamson, 7 Leg. Obs. 340; Korlies *v.* Delaplaine, 2 Sandf. S. C. 680. So where a party obtains further time to answer or reply, he has waived his right to object for impertinence. Ib. So noticing a case for trial is a waiver. Esmond *v.* Van Benschoten, 5 Pr. 44.

3. *How it must be made.*—The motion should state specifically the matter objected to. Whitmarsh *v.* Campbell, 1 Paige Ch. 645. Nor should it include any passage which is not impertinent; if it does, it must be overruled in whole. Ib. Buloid *v.* Miller, 4 Paige Ch. 473. Yet where the impertinent matter is so blended with matter that is pertinent that it is impossible to separate them, the whole may be excepted to and struck out for impertinence. Norton *v.* Woods, 5 Paige's Ch. 260. The exception must be in writing and referred to a master to examine and report on. Woods *v.* Morell, 1 Johns. Ch. 103; 5 Blackf. 439; 2 Hay. 407; Mason *v.* Mason, 4 Hen. & Munf. 414.

FORM OF MOTION.

A B, plaintiff,
vs.
C D, defendant.
} *County, ss.* Court of Common Pleas.

And the said C D, defendant, now comes and moves the court here to strike out of the petition (or answer) in this cause, as redundant and irrelevant matter, the following words, to wit: (*Here*

add the words claimed to be redundant and irrelevant, taking care to include only those wished to be stricken out.)

C D,
By E F, his Attorney.

NOTE.—A change of names will be all that is required to change the above form so as to render it applicable to an answer.

VII. *Indefinite and uncertain Pleadings.*

SEC. 118. And when the allegations of a pleading are so indefinite and uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made definite and certain by amendment.

In Otis *v.* Ross, 8 Pr. 193, Shankland, J., was inclined to think this clause did not apply to mere denials, but to new matter contained in an answer. So where a petition contained two causes of action without any distinct separation of them, it was held that the pleading was indefinite and uncertain, and should be corrected on motion, and not demurred to. Wood *v.* Anthony, 9 Pr. 79; Robinson *v.* Judd, 9 Pr. 378. The case of Cahoon *v.* Bank of Utica, 3 Selden, 486, seems to throw doubt on these cases, so far as they decide that duplicity can not be taken advantage of on demurrer. Jewett, J., says: "I think that the complaint is bad, because it unites two causes of action without stating them separately, and because they do not belong to any one class as specified in section 167, of which there are seven. The separate statement of a cause of action, and the separate counts of a declaration, are equivalent terms. The necessity of having each stated by itself in a different count, is as imperative under the code as under the former mode of pleading." The majority of the court thought there was but one cause of action stated in the petition, and hence must have agreed with Jewett, J., on his proposition.

This part of section 118 would seem to give the court power to act on its own motion, in order to compel parties to make their pleadings so definite, that a distinct issue may be presented to the court and the jury. If the petition states no cause of action, because it is too indefinite to say what it means, then it will be open to a demurrer.

It would seem that, since duplicity can be raised on demurrer, this clause can seldom be of any use as between parties, but may be so to the courts, where the parties are disposed, as they often

are, to try cases without any definite issue being made up in the case.

In the case of Union Bank *v.* Bell, 14 Ohio St. 200, 208, the court say: "Seven causes of demurrer are assigned. The first four of them consist solely of an alleged want of definiteness and certainty in the averments of matters of fact contained in the answer. Now, if the allegations of the answer were so indefinite and uncertain that the precise nature of the defense was not apparent, the remedy is by motion to the court to require the pleading to be made more definite and certain by amendment, according to the provisions of section 118 of the code of civil procedure. The indefiniteness and uncertainty of pleading can not be remedied or taken advantage of by demurrer. Trustees *v.* Odlin, 8 Ohio St. 293; Lewis *v.* Coulter, 10 Ohio St. 451. Considering, however, the relations of the parties in this case, and that the facts alleged generally in the answer, by way of defense to the action, are, in their particulars, peculiarly within the knowledge of the plaintiff, we think that the same stringent rules, in respect of definiteness and certainty of allegation, ought not to be applied to the now defendants, as these might properly be, if the minute facts generally stated by them in their answer were, from the nature of the case, as well known to them as they are to the plaintiff, and we are, therefore, of opinion that even if a motion had been made for that purpose, the courts below would hardly have been required to compel the defendants to make the allegations of their answer more definite and certain." The answer in this case was of matters wholly transpiring between the plaintiff and another party, of which the defendants answering could in law be presumed to have no knowledge; hence they were allowed to plead generally under the strictest rules of common-law pleading. See review of Saunders *v.* Stotts, reported in 6 Ohio, 380; 2 Western Law Journal, 297, where this subject is discussed, and the cases examined. A plea of covin may be general, because covin is a fraud, between two or more to cheat a third person; hence in pleading the fraud he may aver it generally. So, too, when the facts are in the knowledge of the opposite party rather than in the one pleading.

Smith, J., in Kerr *v.* Hays, 35 N. Y. 331, discusses this question. "The plaintiff," he says, "objected, in the first place, to the defendant's showing under his answer a right of way, or a way, on the premises, because the facts giving a way, or a right of way, were not set out in the answer. The defendant had pleaded sep-

arately a public highway, and a right of way in himself, and the objection was to his giving evidence under either plea. If either plea was sufficient, the objection, being general, was not tenable. The answer setting up a public highway was sufficient under the rules of pleading existing before the code, as well as since. In the case of Aspindall *v.* Brown, 3 Term, 266, it was held that, in pleading a public highway, it is sufficient to state concisely that it is a public highway, without showing how or when it became so. The reason assigned in the case above cited is that, if the rule were otherwise, great inconveniences would follow, for strangers passing along the streets of London could not ascertain when they first became highways. This mode of pleading a public highway is in harmony with the code, as it is a concise statement of an issuable fact. In respect to pleading a private way, the rule is different. The party claiming a private way is supposed to be cognizant of the origin of the right and the extent of it, and he must, therefore, aver his title and the termini of the way. 1 Arch. Nisi Prius, 457. But the plaintiff did not invoke the benefit of that rule, as he did not object specifically to the introduction of evidence under that branch of the answer which alleged a private way.

"Again, if the plaintiff had taken that specific objection on the trial, it would not then have been available to him. If the answer was defective, it was only so because it alleged the *private way in too general terms.* It was not sufficiently definite and certain in that respect. The remedy of the plaintiff for that defect was by motion, by section 160 of the code, to compel the defendant to make the answer more definite and certain. By omitting that remedy, he was precluded from objecting to the evidence on the trial. 3 Kern. 538; 15 N. Y. 425; 18 N. Y. 119."

This case shows very clearly what is meant by a want of certainty and definiteness in one form of it. He plead he had a *private road;* now he should set out how and when that private road was obtained, and the extent of it, and what right he had under it. On a motion, the defendant would have been compelled to set out all these facts; but, going to trial on the general averment, the question of private road, or no private road, was in issue, and could be tried under that general plea.

An answer may want definiteness in either of two ways: 1. It may not state all the facts necessary to be stated, with a general averment; or, 2. It may arise from the pleading not showing with certainty what is its specific meaning; there may be an uncertainty as to its precise meaning. In either case, by motion, the

pleader can be required to supply the omission in the one case, and render certain which of two or several meanings he attaches to his answer. But if the party fails to do this, and the case goes to trial, the court will construe the pleading in consistency with the evidence; or, if that can not be done, the court will direct, on the trial, the issue to be conformed to the evidence in the case, and that should be done without costs, as the fault lies as much on the one party as the other. Both parties, in going to trial, admit that there is an issue to be tried, and that the record presents that issue. If both parties are, in the opinion of the court, mistaken as to the true effect of the issue made, no costs in correcting this mistake should be charged to either party.

But there is here a remark to be made: before a motion can be required, there must be *some sort* of averment on the particular fact claimed to be indefinite. If there is the *total* absence of any averment of a particular fact necessary to be stated to make a good petition or answer, a demurrer will lie. A party can not compel a motion to supply *omissions* in his petition or answer. There must be some sort of an averment of a material fact in order to require a motion. The case above cited shows one aspect of the question; the other kind arises when the pleader, in reading the pleadings of his adversary, finds himself in doubt as to what the pleader meant by it. To illustrate a case, let us suppose a suit by an indorsee against the maker, and there is an omission of any averment of the indorsement of the note; here there is nothing to be made more definite; there is the total absence of the averment of the material fact, and the pleading is open to a demurrer. So where the indorsee sues the indorser, and omits to aver demand and notice. So in an action for malicious prosecution, if there is an omission of an averment of a want of probable cause, the petition is bad on demurrer. In all these cases, it is the *total absence* of a material fact, not an indefinite statement of it, in which the pleading is defective. A defective averment is one thing; no averment at all is another and different thing.

If the pleader omits the Christian names of the parties to the action without the allegation of a sufficient excuse, the pleadings will be indefinite and uncertain. Applemans *v.* Blanche, 14 Mees. & Wels. 154; Esdaile *v.* Maclean, 15 Ib. 277. The averment of excuse is not traversable. Ib.

In stating the time of the occurrence of events, it is sufficient to say that such an event occurred thereafter. Martin *v.* Kanouse, 2 Abb. 331; Kellogg *v.* Baker, 15 Ib. 287; Brown *v.* Harmon, 21

Barb. 510; Beesley *v.* Dolby, 6 Bing. N. C. 37; Bertine *v.* Varian, 1 Edw. Ch. 343; Jackson *v.* Johnson, 5 Ala. N. S. 191; Potter *v.* Thompson, 22 Barb. 87. If the time when an event happened, is material to the cause of action, it should be stated; but if the time is immaterial, a demurrer will not lie for omitting it. The remedy is to apply to make it more certain. People *v.* Ryder, 12 N. Y. 433, 439; Barnes *v.* Mattison, 5 Barb. 378; Nash *v.* Brown, 18 Law Jour. N. S. 62; Payne *v.* Banner, 15 Ib. 227; Marshall *v.* Powell, 8 Law Times, Q. B. 159; 13 Jur. 126.

If an averment is made of an offer to pay on the proper day, and a different day is stated under *videlicet*, it is inconsistent and the last date should be rejected as surplusage. Lester *v.* Jewett, 11 N. Y. 460; Vail *v.* Lewis, 4 Johns. 450; Gleason *v.* McVicker, 7 Cowen, 42; Lyon *v.* Clark, 8 N. Y. 148; Dubois *v.* Beaver, 25 N. Y. 123.

Where a contract, void by the laws of the forum, is sought to be enforced, the plaintiff must aver the place where it was made and the law of the place which authorized it to be made. Watcher *v.* Morris, 11 N. Y. 437, 440. And it is a general rule of pleading that if the matters are local in their nature, the allegation and proof of place is material. Vermilya *v.* Beaty, 6 Barb. 430; Steph. Pl. 288; Beach *v.* Bay State, 18 How. 335; 30 Barb. 433; 10 Abb. 71.

An entire pleading can not be stricken out under these sections. Benedict *v.* Dake, 6 How. 352; Hull *v.* Smith, 1 Duer, 649; Howell *v.* Knickerbocker Life Ins. Co., 24 How. 475; Blake *v.* Eldred, 18 Ib. 240. It is too late after the trial to object that pleadings are indefinite. Bank *v.* Sherman, 6 Bosw. 181; S. C., 33 N. Y. 69; 29 How. 573.

Examples of uncertain or indefinite averments.—That the plaintiff was duly appointed receiver. White *v.* Joy, 13 N. Y. 83, 86; Gillett *v.* Fairchild, 4 Denio, 83. That the defendant had made repeated acknowledgments. Bloodgood *v.* Buren, 8 N. Y. 362. That the plaintiff is indebted on account of previous transactions. Eno *v.* Woodworth, 4 N. Y. 249. The words, *a large sum*, without reference to any amount. Heywood *v.* City of Buffalo, 14 N. Y. 534, 544. That the defendant "covenanted." Austin *v.* Searing, 16 N. Y. 112. This was a contention between members of an Odd Fellows' lodge. The petition averred that each member covenanted with each and all to observe the constitution. This was held insufficient, in not stating how covenanted, and setting it out. That the award was duly made by the referees. Everard *v.* Patterson,

6 Taunt. 625. That plaintiff was duly appointed administrator. Beach *v.* King, 17 Wend. 198. That the act was done in a suspicious manner, Muse *v.* Kaye, 4 Taunt. 34; or according to statute, Walker *v.* Maxwell, 1 Mass. 104; or contrary to statute. Smith *v.* Lockwood, 13 Barb. 209. That by virtue of a certain writ or other warrant, etc. 1 Saund. 298, note 1. Or that the act was done in due course of law. Currie *v.* Henry, 2 Johns. 437. That he was compelled to pay by a court of competent jurisdiction, without stating what court. Packard *v.* Hill, 7 Cowen, 442; Patton *v.* Foote, 1 Wend. 209. That the defendant was bound to repair. Casey *v.* Mann, 5 Abb. 91; S. C., 14 How. 163; Corey *v.* Mann, 6 Duer, 679. That a ship was seized as prize. Beak *v.* Tyrrell, Carth. 31.

The precise parts of the pleading objected to must be pointed out by the motion, so that the order when made may be definite. If it covers words not liable to be stricken out, the motion will be overruled. Bryant *v.* Bryant, 2 Rob. 612.

FORM OF MOTION.

A B, plaintiff, *vs.* C D, defendant. } *County*, *ss.* Court of Common Pleas.

And the said A B, plaintiff, now comes and moves the court here to order the said C D to make his pleadings and issues in this petition definite and certain within a reasonable time; or, on failure to do so, that the answer of the said defendant may be stricken out.

Dated, etc.

A B,
By , his Attorney.

ANOTHER FORM BY DEFENDANT.

And the said C D, defendant, now comes and moves the court here to order the said plaintiff to make his said petition definite and certain, by separately stating his said causes of action, (or, by setting forth his said cause of action distinctly and methodically,) and so as to permit a distinct issue to be raised on each material fact constituting his cause of action.

C D,
By , his Attorney.

ORDER.

A B, plaintiff,
vs.
C D, defendant. } Petition.

And now came the said parties by their attorneys, and thereupon the motion of the said C D, defendant, (or, the said A B, plaintiff,) came on to be heard, and was argued by counsel; on consideration whereof the court find that the said plaintiff has included in his said petition several causes of action in a single statement or count, (or, that the said plaintiff hath so loosely stated his cause of action, that it is difficult for the court to understand its precise meaning and extent;) it is therefore ordered that the said plaintiff correct his said petition within days, (or, instanter,) by separately stating his said causes of action; (or, by more definitely and clearly stating the facts constituting his cause of his action.)

VIII.—*Consolidation of Actions.*

Sec. 143. Whenever two or more actions are pending in the same court, which might have been joined, the defendant may, on motion and notice to the adverse party, require him to show cause why the same shall not be consolidated; and if no such cause be shown, the said several actions shall be consolidated.

Sec. 144. The order for consolidation may be made by the court, or by a judge thereof in vacation.

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1. The parties to the actions must be the same. Brewster *v.* Stewart, 3 Wend. 44; 2 Nott & McCord, 440; People *v.* McDonald, 1 Cowen, 189.

2. The actions must be such as might have been joined. Hence, the cause of action in the second suit must have accrued at the time the first action was brought, otherwise they could not have been joined; though in Dunning *v.* Bank of Auburn, 19 Wend. 23, a consolidation was ordered, though one suit was commenced before the cause of action in the other suit had accrued. This is, however, against the whole current of authority.

3. Still it is a matter of discretion with the court whether, where these facts exist, the consolidation will be ordered. It is a motion addressed to the discretion of the court. McRae *v.* Boast, 3 Rand. 481; Scott *v.* Brown, 1 Nott & McCord, 417, note; Powell *v.* Gray, 1 Ala. 77; Cecil *v.* Briggs, 2 D. & E. 639; 1 Tid. 556. The rule is thus stated in Thompson *v.* Shepherd, 9 Johns. 262: The motion

for this rule must be denied. The notes are of *different dates*, *different sums*, and payable at *different times;* and for anything that appears, different defenses may be set up in the several suits. To compel a consolidation under such circumstances would be going further than is the usual practice in this court, or the K. B. in England (1 Caine), 114, though the case of Cecil *v.* Briggs, 2 Term, 639, would seem to extend the consolidation rule to all actions between the same parties, and brought at the same time, where the causes of action might be comprised in the same declaration. A liberal extension of this rule is well calculated to prevent oppression by an unnecessary accumulation of costs, and we should be inclined to say, that where separate suits are brought upon notes or contracts made at the *same time*, and which *might have been united in one action*, and when the defense is the same in all, a consolidation rule ought to be granted.

So where the defendant proposes to make no defense, the actions ought to be consolidated, to save the defendant costs, provided in other respects they come within the rule. Wilkinson *v.* Jones, 4 Hill, 46.

The consolidation is made for the benefit of the defendant; and hence, if he objects, no consolidation can take place. Graff *v.* Musser, 3 S. & R. 262; 1 Overt. 396.

NOTICE.

A B, plaintiff, *vs.* C D, defendant. } *County, ss.* Court of Common Pleas.

The said A B, plaintiff, will hereby take notice that he is required to show cause, on the first day of the next term of said court, or as soon thereafter as the motion can be heard, why the four several actions now depending in said court in favor of the said plaintiff, and against this defendant, should not be consolidated into one; at which time and place you can appear and object, if you see fit.

Dated, etc.

C D,
By E F, his Attorney.

NOTE.—If the application is to be made to a judge, the notice must specifically state the time, place, and judge before whom the application is to be heard. These words can be inserted after the

word "defendant:" "Will apply to the Hon. , judge of said court, at his residence, in the town of , at one o'clock on the day of , A. D. 18 ,"—in lieu of those referring to time and court.

Actions between same Parties.

MOTION.

A B, plaintiff, } *County, ss.*
vs.
C D, defendant. } Court of Common Pleas.

And now comes the said C D, defendant, and moves the court here, (or, the Hon. , [one of the judges of said court]) to consolidate into one the four several actions now depending in this court, in each of which the said A B is plaintiff, and the said C D is defendant, and which actions could all have been joined in one action.

Dated, etc.

C D,
By E F, his Attorney.

Actions between Same Parties.

A B, plaintiff, }
vs.
C D, defendant. }

On motion of the said C D, by E F, his attorney, and on proof of notice to the said plaintiff having been given, and no sufficient cause to the contrary being shown by the said A B, it is hereby ordered that the said four several actions be consolidated into one action, and all the said several causes of action be included in one and the same petition; and it is further ordered that the said plaintiff within days file such a petition in this case, being the first on the docket, including all the said several causes of action sued for in all of said four several actions; and it is further ordered that the said A B pay all the costs incurred in all of said actions but this, and is not allowed to tax the same to the defenddant, the said C D.

NOTE.—This form will need but a slight alteration to make it answer for one by a judge: "On application of the said C D, etc., to me, S N, one of the judges of said court, and no," etc.

Where the pleading of an averment is too indefinite, the defect can only be reached by motion to make it more definite, and not by a demurrer. Lewis *v.* Coulter, 10 Ohio St. 451.

Where causes of action are not stated separately, the defect can only be reached on motion. Hartford *v.* Bennett, 10 Ohio St. 441.

CHAPTER XVIII.

FORMS OF PETITIONS.

Beginnings of Petitions.

County, ss., Court of Common Pleas.

A B, plaintiff,
vs.
C D, defendant. } Petition.

The said A B, plaintiff, complains of the said C D, defendant, for that, etc.

BY PARTNERS *v.* PARTNERS.

County, ss., Court of Common Pleas.

A B, C D, and E F,
doing business under the name of
A B & Co., plaintiffs,
vs.
G H & I J,
doing business under the name of
H & J, defendants. } Petition.

The said A B, C D, and E F, partners, doing business under the name of A B & Co., plaintiffs, complain of G H and I J, partners, doing business under the name of H & J, defendants, for that, etc.

BY INFANT.

County, ss., Court of Common Pleas.

A B, an infant,
By E F, his next friend, plaintiff,
vs.
C D, defendant. } Petition.

The said A B, by E. F, who is admitted by the court here to prosecute for the said A B, who is an infant under the age of twenty-one years, (*if a male;* eighteen years, *if a female;*) as the next friend of the said A B, plaintiff, complains of the said C D, defendant, for that, etc.

By and against Executors and Administrators.

EXECUTOR *v.* EXECUTOR.

A B, executor of E F, plaintiff,
vs.
C D, executor of G H, defendant. } Petition.

The said A B, executor of the last will and testament of E F, deceased, plaintiff, complains of C D, executor of the last will and testament of G H, deceased, for that, etc.

ADMINISTRATOR *v.* ADMINISTRATOR.

A B, administrator of E F, plaintiff,
vs.
C D, administrator of G. H, defendant. } Petition.

The said A B, administrator of the estate of E F, deceased, plaintiff, complains of C D, administrator of the estate of G H, deceased, defendant, for that, etc.

ADMINISTRATOR WITH WILL ANNEXED.

The said A B, administrator, with the last will and testament of G C, deceased, annexed, of the estate which was of the said G C, deceased, plaintiff, complains of C D, defendant, for that, etc.

SURVIVING PARTNER *v.* SURVIVING PARTNER.

A B, plaintiff,
vs.
C D, defendant. } Petition.

The said A B, survivor of E F, doing business under the name of A B & Co., plaintiff, complains of C D, survivor of H S and N O, doing business under the name of D H & Co., defendants, for that, etc.

Where there are several Causes of Action in the same Petition.

The said A B, plaintiff, complains of the said C D, defendant: *First.* For that the said (*here state the first cause of action*); *Secondly.* And also for that (*here state the second cause of action*); *Thirdly.* And also for that (*here state the third cause of action*). And the said plaintiff saith that said defendant hath not paid several sums of money, or either of them, or any part thereof, to the said plaintiff.

Wherefore the said plaintiff prays judgment against said defendant for the said several sums of money, amounting to $, together with interest thereon from the day of , A. D. 18 .

(Or, if the interest on the various sums does not date from same time, then say:) together with interest on $ from day of ; on $ from such a day ; on $ from such a day, etc.

The matter of interest should be so stated, that the court can calculate it on a default, from the statements in the petition.

Andrews, J., in Daby *v.* Ericsson, 45 N. Y. 786, 789, thus states the law: "Upon the death of one partner, the demands and choses in action of the partnership belong to the surviving partners, and they possess the sole and exclusive right to reduce them to possession, and when recovered, they stand as trustees for the representatives of the deceased partner to the extent of his interest."

The law not only vests the legal title to the choses in action in the surviving partner, but it casts upon him the duty to get in the debts and settle the affairs of the partnership. The *jus accrescendi* exists for this purpose. Story on Part. 346; Murray *v.* Mumford, 6 Cowen, 441; Peters *v.* Davis, 7 Mass. 257; Jarvis *v.* Hyer, 4 Dev. 367. The right to assign is incident to the possession of the legal title, and a defendant in an action by the assignee can not question the consideration upon which it was made. Story on Part, sec. 115; Peterson *v.* Chemical Bank, 32 N. Y. 21. The code has not changed the rule upon this subject. The survivor of a firm is the real party in interest to a demand owned by or due to the firm. The debtor can not, when sued by the survivor, object that the representatives of the deceased partner are not made parties with the survivor.

The mode of commencing actions by and against corporations and the manner of stating the name of the party, where it is a corporation, came up for consideration in the District Court, in Jackson county, at its September term, A. D. 1858, Peck, Whitman, and Nash, JJ. The court held, that where a corporation was organized under a special act of the General Assembly, the court could take notice of the charter and of the fact that it was a corporation. Brown *v.* The State, 11 Ohio, 276, 280. But in the case of a corporation organized under a general law, the court will take notice of the law, not of the existence of the corporation. In this case, the law does not create the corporation, it merely authorizes the stockholders under certain circumstances to organize a corpora-

tion, and this organization is a private, not a public act; hence, the court can not take any judicial notice of such a corporation; it must, therefore, appear on the pleadings by proper averments, that the name used represents a corporation duly organized according to law.

Where, however, a suit was commenced by Beasby *v.* The Iron Valley Furnace Co., and the defendant by this name appeared by counsel, and filed a demurrer to the petition, which demurrer was heard and overruled, and judgment thereupon rendered against such company, the court held that the defendant must be presumed to be a corporation, otherwise it could not appear by such name; and that the filing of the demurrer was a waiver of the defect in the petition, in not stating that the defendant was a corporation, duly organized under the laws of this State. By filing the demurrer, the defendant admits his capacity to be sued by that name. If, however, the defendant is not a corporation, but a mere partnership, then the error must be reached in another way, by a petition in error, which alleges for error in fact, that the defendant was not a corporation, but the name of a mere partnership; the truth of this fact might be denied, and thus present an issue in fact, or demurred to as true, and thus present an issue of law.

The practice in New York is laid down in the case of the Phenix Bank *v.* Donnell, 40 N. Y. 410. The court there hold that the averment ought to be made, but that if it appears upon the face of the complaint that a plaintiff suing as a corporation is not such in fact, a demurrer is the proper remedy of the defendant under section 144. If the complaint does not show that the plaintiff is not a corporation on its face, the objection that it is not such must be taken by answer under section 147. I do not consider this rule the correct one so far as it applies to corporations, organized under our general corporation law. It was probably right in that case, as the bank was incorporated under a special law.

Under these rulings the form for stating the name of the parties in such a case will be as follows:

A B, plaintiff,
vs.
The Young America Furnace Co., defendant. } Petition.

A B, plaintiff, complains of The Young America Furnace Co., a corporation duly organized under the laws of this State, defendant, for that, etc.

Or this:

The Iron Valley Furnace Co., plaintiff,
vs.
The Diamond Furnace Co., defendant. } Petition.

The said Iron Valley Furnace Co., a corporation duly organized under the laws of this State, plaintiff, complains of the said Diamond Furnace Co., a corporation duly organized under the laws of this State, defendant, for that, etc.

Where the corporation is a foreign corporation, the court can not take notice of its charter and legal existence; hence, there ought also in such a case to be a somewhat similar averment. The form might be like the following:

The Northwestern Bank of Virginia, plaintiff,
vs.
C D, defendant. } Petition.

The Northwestern Bank of Virginia, a corporation duly organized under the laws of the State of Virginia, plaintiff, complains of C D, defendant, for that, etc.

In stating the name in the heading of the case, it is sufficient to state simply the name of the corporation, and make the averment of its being a corporation in the petition, as in the forms already given. It would hardly seem necessary to make the same statement twice. The form in that case would be like the following:

The Diamond Furnace Co., plaintiff,
vs.
The Scioto Rolling Mill Co., defendant. } Petition.

The Diamond Furnace Co., a corporation duly organized under the laws of this State, plaintiff, complains of the Scioto Rolling Mill Co., a corporation duly organized under the laws of this state, defendant, for that, etc.

Partnership, when sued by that Name.

The statute of February 27, 1846 (2 S. & C. 1138), authorizes actions by and against partnerships in the partnership name. This statute came under consideration of the District Court, in Gallia county, at its September term, A. D. 1858, in the case of A. Frost & Co. *v.* Thornley. The action was brought in the name of A. Frost & Co., without any other or further designation; the defendant answered that A. Frost & Co. was a partnership doing business in the State of New York; to this answer, a demurrer was interposed; the court below overruled the demurrer, and rendered judgment thereon against the plaintiff. This petition in error was prosecuted to reverse the judgment.

The court—Nash, Peck, and Whitman, JJ.—held that the statute only authorized such companies or partnerships, to sue or to be sued in the partnership name, as were formed for the purpose of carrying on some trade or business in Ohio, or for the purpose of holding property in this State. The company or partnership must be an Ohio company or partnership, otherwise it could neither sue nor be sued in its partnership name; hence, a partnership located in New York could not bring a suit in Ohio by its partnership name; the court below, therefore, did not err in the judgment it rendered.

In the case of Iron Valley Furnace Co. *v.* Bunn, Pickerel & Co., decided by the same judges, in the Jackson District Court, it was held, that where an action is brought in a partnership name, or a firm is sued in the firm name, the petition must contain the statement that the same is a partnership formed for the purpose of doing business or holding property in Ohio; and that without this averment a demurrer will lie for a defect of parties. As the statute allows actions to be thus prosecuted only in a particular class of cases, the party must by proper averments show that he comes within the provisions of the statute, and he can only do this by averring that the company is a company or partnership doing business in Ohio. The following form will serve as a guide in such cases:

A B & Co., plaintiff,
vs.
C D & Co., defendant. } Petition.

A B & Co., a company of persons, formed for the purpose of carrying on trade (or business) within the State of Ohio, and not incorporated as such, plaintiffs, complain of C D & Co., a company of persons formed for the purpose of holding property within the State of Ohio, and not incorporated as such, defendants, for that, etc.

This form can be easily modified so as to meet any peculiarity in the name of the company; as, *The Iron Valley Company, a company of persons formed for the purpose of carrying on business within the State of Ohio, and not incorporated as such, plaintiff, etc.*

COMMON COUNTS.

NOTE.—We here insert the counts heretofore known as the common counts, substantially as they were stated in an action of debt. The count avers an indebtedness, for what that indebtedness was incurred, that it was due, and that it had not been paid. Without authority, these counts would seem as applicable under

the code as under the old system of pleading. They contain all the facts which show the plaintiff's right to recover. In the third subdivision of the seventh district, it was constantly held that these counts were sufficient, where they correctly described the state of facts. It is believed that the same ruling prevailed in the other portions of the district. In New York one or two judges at first doubted whether this form of declaring was sufficient. The first doubt may have been started in Eno *v.* Woodworth, 4 Comst. 249, by Judge Bronson, and it was followed by some other judges. Blanchard *v.* Strait, 8 Pr. 83; Wood *v.* Anthony, 9 Pr. 78. But in Glenny *v.* Hitchins et al., 4 Pr. 98, Sill, J., had held such a count to be good, and that no promise to pay need be stated as in the old forms in assumpsit. The count in that case may have been bad, for not averring that the debt was then due and payable. This question was, however, finally settled in New York, by the Court of Appeals, in the case of Allen et al. *v.* Patterson, 3 Selden, 476. The petition in that case was in these words: "The plaintiffs complain against the defendant for that the defendant is indebted to the plaintiffs in the sum of $371.01, for goods sold and delivered by the plaintiffs to the defendant, at his request, on the first day of May, 1849, at the city of Buffalo, in said county. And the plaintiffs say that the items in their account exceed twenty in number. And the plaintiffs say that there is now due them from the defendant the sum of $371.01, for which sum the plaintiffs demand judgment against the defendant, with interest from the 20th day of October, 1849, besides costs." To this complaint a demurrer was interposed for the following reasons:

"The complaint does not state facts sufficient to constitute a cause of action in this:

"1. There is no allegation in the complaint of a contract by the defendant.

"2. The plaintiffs have alleged no breach of any contract by the defendant.

"3. There are no facts stated in the complaint showing that the defendant, at the time of the commencement of said action, was indebted to said plaintiffs.

"4. There are no facts stated in the complaint showing that anything was due and payable from the defendant to the plaintiffs at the commencement of this action."

Jewett, J., says: "The code requires that a complaint shall contain a plain and concise statement of the facts constituting the cause of action. Every fact which the plaintiff must prove to en-

able him to maintain his suit, and which the defendant has a right to controvert in his answer, must be distinctly averred or stated. This rule of pleading, in an action for a legal remedy, is the same as formerly in this, that *facts* and not the *evidence* of facts must be pleaded. 1 Chitty Pl. 215; Reed *v.* Brookman, 3 Term, 159, per Butler, J.; Eno *v.* Woodworth, 4 Comst. 249.

"The plaintiffs, in their complaint in this action, state that the defendant is indebted to the plaintiffs in the sum of $371.01 for goods sold and delivered by the plaintiffs to the defendant at his request, on the 1st day of May, 1849, etc., and that there is now due them from the defendant the sum of $371.01, for which they demand judgment, etc. In substance, stating that on the 1st day of May, etc., the plaintiffs, at the request of the defendant, sold and delivered to him goods, for which he then owed or was bound to pay the plaintiffs the sum of $371.01, and further averring that there was then due them from the defendant the sum of $371.01 (that is, that the time when said money for said goods was promised to be paid had expired), for which sum the plaintiffs demand judgment, etc. The question is, then, are there facts enough stated to constitute a cause of action? I think there are.

"The words that the defendant is indebted to the plaintiffs in the sum of $371.01, for goods sold and delivered by them to him at his request, and that there was then due the plaintiffs from the defendant that sum, clearly imply that a contract had been made between the plaintiffs and defendant, by which the former sold and delivered the latter goods at his request, for which he promised to pay the plaintiffs the sum of $371.01; and that the period in which the same was promised to be paid had expired. It contains every statement of fact necessary to constitute a good *indebitatus* count in debt, according to the mode of pleading before the code. 2 Chitty Pl. 142; Emery *v.* Fell, 2 Term, 28; 1 Chitty Pl. 345."

The judge then proceeds to show that the word *due* imports a debt *due and payable*, and not simply the fact of a mere indebtedness. The judgment below for the plaintiffs was therefore affirmed.

This case distinctly affirms that what was, under the old practice, a good *indebitatus* count in debt, is now a good count under the code. There never was any ground to doubt it. Such a count states all the *facts* of the case; that the plaintiffs sold and delivered goods to the defendant at his request, and the value of them. This is a contract. The law implies a promise to pay from the fact

stated, and legal *conclusions* are never to be stated. Swan's Stat. 640, sec. 129. This is all there can be in a sale of goods.

It will be seen that the following forms obviate the only real difficulty in such cases, by the averment that the sum stated was then due and payable. The time stated should be the time when the account or debt became payable, and the averment that the sum is then due and payable will correspond; though, as time is not material, an error in this particular can probably make no difference, provided the date from which interest is to be run is correctly stated. *Vide* Lyon *v.* Clark, 4 Selden, 148. An allegation that plaintiff paid certain judgments on a named day does not confine the plaintiff to that day. The time, as a matter of pleading, was immaterial. The plaintiff might allege any time after the judgments had been obtained against him, and give in evidence the true time. Per Willard, J., Ib. 157; Moffet *v.* Sacket, 18 N. Y. 522; Farran *v.* Sherwood, 17 N. Y. 227.

This question came up again in the case of Farran *v.* Sherwood, 17 N. Y. 227. Strong, J., in delivering the opinion of the court, says: "The case is therefore within the well-settled rule that when there is a special agreement, and the plaintiff has performed on his part, the law raises a duty on the part of the defendant to pay the price agreed upon, and the plaintiff may count either on the implied assumpsit or on the express agreement. A new cause of action upon such performance arises from this legal duty, in like manner as if the act done had been done upon a general request, without an express agreement. Laws Pl. 5; Jewell *v.* Schroeppel, 4 Cowen, 564; Feeter *v.* Heath, 11 Wend. 484; Mead *v.* Degolyer, 16 Ib. 637, 638; Clark *v.* Fairchild, 22 Ib. 576. This rule is not affected by the code. The plaintiff might, as he has done, rest his action on the legal duty; and his complaint is adapted to and contains every necessary element of that cause of action. It is not necessary to state in terms a promise to pay. It was sufficient to state facts showing the duty from which the law implies a promise; that complies with the requirement that facts must be stated constituting the cause of action. Allen *v.* Patterson, 3 Selden, 476."

The same form of declaring was resorted to in the case of Moffet *v.* Sacket, 18 N. Y. 522. Strong, J.: "The plaintiff claims in his complaint that the defendant is justly indebted to him in the sum of $197.35, together with interest thereon on an account for goods, wares, and merchandise sold and delivered to the defendant by the plaintiff, and for work and labor done and performed, and for cash

paid, laid out, and expended by the plaintiff for and at the request of the defendant. . . . That the requisition in section 142 of the code, that the complaint must contain a plain and concise statement of the facts constituting a cause of action is satisfied by the general allegation of indebtedness for goods sold and delivered, was decided by this court in Allen *v.* Patterson, 3 Selden, 476."

The same question was made again in Fells *v.* Festvali, 2 Keys, 152. The action was upon a *quantum meruit*, for services alleged to have been rendered by plaintiff for defendant. Davis, J.: "If the plaintiff was entitled to recover at all, it was on the ground that the services had actually been rendered; and after the complete performance of an express contract, there is no reason why a recovery may not be had under this form of pleading. The only effect in such a case of proof of an express contract fixing the price is, that the stipulated price becomes the *quantum meruit* in the case."

The question was again persisted in in the case of Hosley *v.* Black, 28 N. Y. 438, 443. Balcom, J.: "The complaint contains seven distinct counts, three of which are similar in substance to the count *indebitatus assumpsit* for work and labor used prior to the code of procedure. That count always was sufficient to authorize a recovery for work and labor performed under a contract not under seal, unless the party performing the work and labor had failed to fulfill the contract. 4 Wend. 285; 11 Ib. 479; 22 Ib. 576; 1 Cow. Tr., 2 ed. 124; 2 Ib. 635, 1128. This court held, in Farran *v.* Sherwood, 17 N. Y. 227, that the code had not changed the former rule of pleading; that a party, who has wholly performed a special contract on his part, may count upon the implied assumpsit of the other party to pay the stipulated price, and is not bound to declare specially upon the agreement. The same rule was held in the following cases: Allen *v.* Patterson, 3 Selden, 476; Ketteltas *v.* Myers, 19 N. Y. 231; Moffit *v.* Sacket, 18 N. Y. 522."

In the case of Cope *v.* Wheeler, 41 N. Y. 303, James, J., says: "The form of the action was also proper. Where money has been received, which in equity belongs to another, an action for money had and received will lie for its recovery; and now, under the code, any defense, legal or equitable, may be interposed by the defendant."

The same doctrine is maintained in Meagher *v.* Morgan, 8 Kansas, 372. Safford, J.: "The principal question presented by the record in this case is, whether or no the common counts for goods sold and delivered, work and labor done, money had and received, etc.,

when set out in a pleading under the code, contain each in itself facts sufficient to constitute a cause of action, or grounds of defense. We are of the opinion that this manner of pleading is sufficient under the code, as it was under the practice before the code."

These additional authorities ought to settle this question in future. It has been the practice in Ohio so to declare, and no one has made a question of it in the Supreme Court. There should have been no doubt about it in any legal mind. The code adopts Chitty's definition of a declaration as that of a petition. Any petition, therefore, which would have been good as a declaration, is now good as a petition; it states the facts, which constitute a cause of action now as much as it did before.

The common counts are of great practical importance. It is impossible and unnecessary in all cases to set out in detail a special agreement, when the agreement has been executed, and there is nothing left to be done but to pay a certain sum of money. In the sale of real estate, where the land has been conveyed, or the deed tendered, what earthly use in setting out a long special contract, when all that is left is a simple liability to pay the purchase money; and in most cases of special agreements, the contract has been varied in some minute particular, and in that case, no action can be sustained on the special agreement; in that case the common count for land sold and conveyed, goods sold and delivered, money paid, etc., is the only form of stating the facts known to the law. The common counts were originally adopted to meet the inconveniences and dangers of declaring on a special agreement, because the least failure in its execution or departure from it defeated the action and turned the party out of court. The rule is that where work is done, or property sold under a special agreement, a common count is allowable, if the contract has been executed, or if there has been any departure from the terms of it in its execution. This applies to all sales, whether of personal or real estate, in order to enable the pleader to ascertain when they are to be used and when not. The code has not changed the law in this respect; what was heretofore a good declaration, is now a good petition. The pleading before the code set up the facts constituting a cause of action, or a ground of defense; and the code now requires the same thing. Indeed, in many cases no other form is known in law. Where there has been no special agreement, no price agreed on, no time agreed on—nothing done, but that one man has done work for another, or sold and delivered goods to him, the law implies a promise to pay what the work or the goods

are reasonably worth. If the pleader goes one step beyond a statement that the party is indebted to him for goods sold and delivered, or work done at defendant's request, he must go into a statement of the evidence. The money counts are equally important and necessary. No substitute can be found for the count for money had and received, unless the petition sets out the evidence, by which the plaintiff proposes to show that the defendant has got money which belongs to the plaintiff. These counts, too, are brief, and have served the ends of justice for some centuries.

There is one class of common counts which relate to real estate: 1. To a sale of it; 2. To the use of it. All the common counts relating to real estate come under one or the other of these classes. In case of a sale, if the agreement is under seal with a covenant to pay, the action must be on the agreement. The reason is, that a sealed instrument is a higher security, and extinguishes all parol agreements; hence, no action can be brought on common counts, where the law implies the liability. These counts for sale of real estate seldom occur in use, as such contracts are reduced to writing, and notes are executed for the purchase money contemporary with the execution of the conveyance. But there are cases, where the conveyance has been made, and the purchase money not paid, and no note given for the purchase money. In such a case, these counts are a necessity, as no other form will meet the position such a state of facts has assumed.

The count for use and occupation is in more common use. This lies, when one man has occupied and enjoyed the use of the real estate of another, under such circumstances as show that it is done with the consent or acquiescence of the owner. In such a case, the law implies a promise to pay what the premises are reasonably worth.

It is unnecessary to state where the lands lie, or any particular of the demise. If there has been a lease and the premises occupied under it, and nothing remain but the payment of the rent, an action for use and occupation will lie. 6 East, 248; 5 Taunt. 25; 1 Saunders, 241, n. 5. This count is sufficient, though the defendant may not himself have occupied the premises. 8 Term, 327; 16 East, 33; 2 Starkie, 527. This is, of course, where the defendant has occupied in law by some one in his place. But, if the plaintiff has recognized another person as his tenant, he can not afterward charge the defendant. 2 B. & A. 119; 2 Starkie, 235; 4 Taunt. 45; 6 Bing. 206. It may be brought by the assignee of the reversion before attornment. 16 East, 99; 2 H. Bl. 319. Where there is an

agreement under seal for a lease not containing any covenant for the payment of rent, this action may be maintained. Elliot *v.* Rogers, 4 Esp. 59. Lord Kenyon, Ch. J.: "If there was a demise by deed, the plaintiff could certainly not maintain an action in the present form; but this is not a lease of the premises, it is only an agreement for a lease. The defendant does not hold under the the deed; and the action is, therefore, maintainable." This action for use and occupation seems to be the only remedy where there is specific rent agreed upon. 5 B. & A. 322; 2 Saund. 400; 6 B. & C. 251; 3 M. & S. 380. It is not necessary nor advisable to state the local situation; it would be fatal if misstated. 3 Camp. 236; 3 Taunt. 128; 3 M. & S. 380; 1 Taunt. 570; 13 East, 9. In the case of De Young *v.* Buchanan, 10 Gill. & Johns. 149, 156, Spence, J., says: "The action of assumpsit, for use and occupation, can be sustained where it is based upon a contract, either express or implied; and unless it is thus founded, it can not be maintained. Birch *v.* Wright, 1 Term, 387. . . . . It seems, at this day, to be well-settled law that when a tenant for a term of years, or from year to year, holds over after the expiration of the term, he impliedly holds subject to all the covenants in the lease, which are applicable to his new situation. Digby *v.* Atkinson, 4 Camp. 275; Riggs *v.* Bell, 5 Term, 471; 13 Johns. 297."

In order to maintain an action for use and occupation, the relation of landlord and tenant must subsist: there must be a tenancy; if the party occupies under a claim of title or adversely to the plaintiff, the action can not be maintained. Rickey *v.* Hinde, 6 Ohio, 371, 378. If the occupant enter and hold without permission or right he is a trespasser, and the owner can not waive the trespass and make him his tenant without his consent. Peters *v.* Elkins, 14 Ohio, 344, 346. So it will not lie where the occupant goes in as purchaser, and then refuses to pay for the land. Butler *v.* Cowles, 4 Ohio, 205, 212. Where, however, one rents real property and before the end of the term the lease is given up, the owner is entitled to recover for the use and occupation in this form of action. Fitch *v.* Sargeant, 1 Ohio, 352. *Vide* also Tennant *v.* McBride, 3 Ohio, 264; City of Cincinnati *v.* Walls, 1 Ohio St. 222. So where one has leased land to another for a rent to be paid in a portion of the crop and a certain quantity of grain, and the lessee fails to deliver these articles, the lessor may recover, in an action for use and occupation, the market value of crop and grain agreed to be given. Butler *v.* Baker, 5 Ohio St. 584.

An action for use and occupation will not lie, where the defend-

ant's possession was tortious; no contract existing in such case. Henwood *v.* Cheeseman, 3 S. & R. 500; Ryan *v.* Marsh, 2 N. & M. 156; Stockett *v.* Watkins, 2 Gill. & Johns. 326; Wiggin *v.* Wiggin, 6 N. H. 298; Poindexter *v.* Cherry, 4 Yerg. 305; Codman *v.* Jenkens, 14 Mass. 95; Boston *v.* Binney, 11 Pick. 1; Smith *v.* Stewart, 6 Johns. 46; Vandarkeuvel *v.* Storrs, 3 Conn. 203; Bell *v.* Ellis, 1 Stew. & Port. 294; Little *v.* Pearson, 7 Pick. 301; Jones *v.* Tipton, 2 Dana, 295; Clough *v.* Horsford, 6 N. H. 234; Bancroft *v.* Wardell, 13 Johns. 489; Wharton *v.* Fitzgerald, 3 Dallas, 503. The plaintiff must prove a contract, either express or implied. Sutton *v.* Mandeville, 1 Munf. 407; Logan *v.* Lewis, 7 J. J. Marsh. 6; Shattuck *v.* Ransom, 2 Aik. 252; Gunn *v.* Scovil, 4 Day, 228; Osgood *v.* Dewey, 13 Johns. 240; Abeel *v.* Radcliff, 13 Johns. 297; Patt *v.* Lesher, 1 Yeates, 576; Andrews *v.* Andrews, 2 Green, 142; Fitchburgh Cotton Manf. Co. *v.* Melven, 15 Mass. 270; McGrennagle *v.* Thornton, 10 S. & R. 251; Grant *v.* Gill, 2 Whart. 42; Hill *v.* Boutel, 2 N. H. 502; Moore *v.* Beasley, 3 Ohio, 294; Fronty *v.* Wood, 2 Hill, 367; Dorrill *v.* Stephens, 4 McCord, 59; Little *v.* Martin, 3 Wend. 219. Proof of a demise or special agreement (unless by deed) will not prevent a recovery on a count for use and occupation. Perrine *v.* Hankinson, 6 Halst. 181; Mayo *v.* Fletcher, 14 Pick. 525.

These cases, if consulted, will show the application of the rule that the relation of landlord and tenant must exist, expressly or impliedly, between the parties to justify an action of this kind.

II. GOODS SOLD AND DELIVERED.

In general, to enable the plaintiff to recover on a count for goods sold and delivered, it must appear that the goods were sold for money, and that they have been actually or virtually delivered by the plaintiff to the defendant. Edmunds *v.* Wiggin, 11 Shepley, 505; Merrill *v.* Parker, 11 Shepley, 89; Kingman *v.* Hotaling, 25 Wend. 423; Ricks *v.* Dillahunty, 8 Port. 133. Delivering goods to a carrier for the use of a third person, is not such a delivery to the third person as will support an action for goods sold and delivered. Hayne *v.* Porter, 3 Hill, 341.

Where goods are sold on time to be paid for by note on delivery payable on time, an action for goods sold and delivered will not lie, until the time given has expired. If the note is not given, an action on the contract will lie for failing to give the note or bill. Allen *v.* Ford, 19 Pick. 217; Yale *v.* Coddington, 21 Wend. 175. Where goods are sold and note to be given on delivery on time, and the purchaser refused to give the note, he may be sued at once

for that refusal in an action on the contract. Rinehart *v.* Olivine, 5 Watts & Serg. 157. If goods are to be paid for partly in money and partly in goods to be delivered, the vendor must declare specially; he can not recover under the common counts. Harris *v.* Fowle, 1 H. Bl. 287; Tolver *v.* West, Holt, 179; S. C., 3 Eng. C. L. 66. But if the goods be delivered to the plaintiff in part performance, he may recover the money under the common counts; as where the plaintiff agreed to sell a horse to the defendant, to be paid for partly by a horse of the defendant's and partly by money, and the horses were exchanged, but the defendant refused to pay the money; it was held that the plaintiff might recover the money under a count for goods sold. Sheldon *v.* Cox, 3 B. & C. 420; S. C., 10 Eng. C. L. 137; Forsyth *v.* Jervis, 1 Starkie, 437; S. C., 2 Eng. C. L. 461; Ingram *v.* Sherley, Ib. 185; S. C., 2 Eng. C. L. 348.

If the time of credit has not expired, the plaintiff must declare specially, as where goods were to be paid for at the end of three months, by a bill at two months, the credit will not elapse until the end of five months: and if, at the end of three months, the purchaser does not give a bill, the vendor's remedy is by a special action; for he can not recover on the common courts until the expiration of the five months. The default at the end of three months is a failure to give the bill. Mussen *v.* Price, 4 East, 147; Miller *v.* Show, Ib. 149; Dutton *v.* Solomon, 3 B. & P. 582. Where goods were to be paid for by a bill at two months, and the vendee refused to give a bill; it was held that the vendor could not maintain an action for goods sold, until the expiration of two months. Dutton *v.* Solomon, 3 B. & P. 582; Price *v.* Nixon, 5 Taunt. 338; S. C., 1 Eng. C. L. 126. So, if goods were sold at six or nine months, and they are not paid for at the end of six months, the vendee can not be sued for them until the end of nine months. Price *v.* Nixon, *supra*. But where goods were sold at three months' credit, the vendee to give a bill at three months, at the expiration of that period, if he wished for further time, a bill not having been given at the end of three months, it was held that the vendor might immediately sue for goods sold and delivered. Nickson *v.* Jepson, 2 Starkie, 227; S. C., 3 Eng. C. L. 327. Where bills are given for goods and dishonored, the vendor may maintain an action for goods sold and delivered, provided he is the holder of the bills, and in a condition to give them up; but he can not recover, if it appears that the bills are in the hands of a third person. Hickling *v.* Hardey, 7 Taunt. 312; S. C., 2 Eng. C. L. 118; 1 Moore, 61; Kearslake *v.* Morgan, 5 Term, 513; Burden *v.* Holton,

4 Bing. 455; S. C., 15 Eng. C. L. 37; Goodwin *v.* Coates, 1 M. & Rob. 221; Cundy *v.* Mariott, 1 B. & Ad. 696; S. C., 20 Eng. C. L. 474; 5 Serg. & R. 19; 4 Cow. 282; 7 Mass. 329.

When one takes goods by virtue of a sale made by a person who has no authority to sell, the owner may affirm the contract and support a count for goods sold. Gilmore *v.* Wilber, 12 Pick. 120. Where a bailee converts goods delivered to him to his own use, the owner may waive the tort and recover the value of the goods as upon a sale. Baker *v.* Cory, 15 Ohio, 9, 12. The doctrine of waiver applies only to those things which may pass by delivery, and of which possession is evidence of ownership; and therefore it applies not to injuries to the possession of lands. To waive a trespass on land confers no right on the wrong-doer. Peters *v.* Elkins, 14 Ohio, 344, 346. Where one took the goods of another and converted them to his own use without the owner's license, it was held that the plaintiff might waive the tort and the value of the goods be recovered on a count for goods sold and delivered. Hill *v.* Davis, 3 N. H. 384; Floyd *v.* Wiley, 1 Miss. 430; Lubeuena *v.* Hill, Ib. 643; contra, Jones *v.* Hoar, 5 Pick. 285.

Where the plaintiff sold a bill of merchandise to the defendant, on his written agreement to pay certain notes of plaintiff outstanding, as they fell due, and failed to do it, it was held that after the notes had become due and were unpaid, the plaintiff might, in an action, recover the value of the merchandise, on a count for goods sold and delivered. Colvin *v.* Carter, 4 Ohio, 354. Where goods are sold to be paid for in other articles or labor, and the vendee fails to deliver the articles or do the labor, the seller may recover the value of the goods sold in an action on the common count for goods sold and delivered. Newman *v.* McGregor, 5 Ohio, 349, 352. It seems that, where a factor sells goods contrary to instructions, the principal is authorized to treat the factor as a purchaser, and recover the value of the goods sold. Woodward *v.* Suydam, 11 Ohio, 360.

If a special contract has been performed, then an action may be brought upon the contract, or an action of *indebitatus assumpsit* for the work and labor, or for goods sold and delivered, as the case may be. Witherow *v.* Witherow, 20 Ohio, 238, 240. So, where one has sold goods to another, and takes his note for the price, and the note is innocently altered so as to avoid it, the seller may recover for the goods sold and delivered. Merrick *v.* Boury, 4 Ohio St. 60.

WORK AND LABOR.

Wherever there is a special contract or agreement to perform any work, a general *indebitatus assumpsit* will lie, when the work is performed and completed. Leigh P. P. 77; Bull., N. P. 139. If a man agrees to build for another a house, in this case he has two ways of declaring: either upon the original executory agreement, as to be performed in *futuro;* or upon an *indebitatus assumpsit* or *quantum meruit*, when the house is actually built and the agreement executed. Alcorn *v.* Westbrook, 1 Wilson, 117.

If a man declare upon a special agreement and also upon a *quantum meruit*, and at the trial prove a special agreement, but different from what is laid, he can not recover on either count: not on the first, because of the variance; nor on the second, because there was a special agreement. But if he prove a special agreement and the work done, but not pursuant to such agreement, he shall recover on the *quantum meruit*, for otherwise he would not be able to recover at all. Leigh N. P. 78; Cooke *v.* Munstone, 1 N. R. 355; Cousins *v.* Paddon, 1 Gale, 305. But if the plaintiff deviate from the specification, he can not recover on a *quantum meruit*, if the defendant refuses to accept the subject matter of the contract. Ellis *v.* Hamlin, 3 Taunt. 52. Yet, if the defendant adopts the deviations, or derives a benefit from the plaintiff's services, he must pay *pro tanto.* Burn *v.* Miller, 4 Taunt. 745; Farnsworth *v.* Garrard, 1 Camp. 38. When a party engages to do certain work, on certain specified terms and in a certain specified manner, but in fact does not perform the work so as to correspond with the specifications, he is not of course entitled to recover the price agreed upon, nor can he recover according to the actual value of the work, as if there had been no special contract. What the plaintiff is entitled to recover is the price agreed upon in the specification, subject to a deduction, and the measure of that reduction is the sum which it would take to alter the work so as to make it correspond with the specifications. Per Park, J., Thornton *v.* Place, 1 M. & Rob. 219. Where there was an express contract that the plaintiff should repair a chandelier for £10, and, after having repaired *it in part only*, he brought an action for work done, material provided, etc., it was held that he could not recover any remuneration, as he had delivered it in an imperfect state; the contract was entire, and the plaintiff had not performed his part of it; he, therefore, could recover nothing. Sinclair *v.* Bowles, 9 B. & C. 92; S. C., 17 Eng. C. L. 340; Phelps *v.* Sheldon, 13 Pick.

50; Watchman *v.* Crook, 5 Gill & Johns. 239; Philbrook *v.* Belknap, 6 Vt. 383; Sickle *v.* Pattison, 14 Wend. 257; Brinley *v.* Tibbits, 7 Greenl. 70; Heyden *v.* Madison, Ib. 76; Shaw *v.* Lewiston T. Co., 2 Penn. 454; Roberts *v.* Havelock, 3 B. & Ad. 404; S. C., 23 Eng. C. L. 105.

By way of defense, the defendant may show that the work or materials were of an inferior description. Cousins *v.* Paddon, 1 Gale, 305; Boston *v.* Butler, 7 East, 479; Wilmot *v.* Smith, 3 C. & P. 453; S. C., 14 Eng. C. L. 386. If there has been no beneficial service there shall be no pay. Heath *v.* Treeland, 1 M. & W. 543; Atkinson *v.* Bell, 8 B. & C. 277; S. C., 15 Eng. C. L. 216.

Where there is a special contract, and new work is performed not included in the contract, the plaintiff is entitled to recover the value of it on the common count for work and labor. Robson *v.* Godfrey, Holt, 236; 3 Eng. C. L. 85; 1 Starkie, 275; S. C., 2 Eng. C. L. 388; Dubois *v.* Del. & Hud. Canal Co., 4 Wend. 285; S. C., 12 Wend. 334; Hollingshead *v.* Mactier, 13 Wend. 276.

If you employ a man to build a house on your land or to make a chattel with your materials, the party who does the work has no power to appropriate the produce of his labor and your materials to any other person. Having bestowed his labor at your request on your materials in making a chattel, he may maintain an action against you for work and labor. But if you employ another to work up his own materials in making a chattel, then he may appriate the produce of that labor and materials to any other person. No right to maintain any action vests in him during the progress of the work; but when the chattel has assumed the character bargained for, and the employer has accepted it, the party employed may maintain an action for goods sold and delivered; or, if the employer refuses to accept, a special action on the case for such refusal; but he can not maintain an action for work and labor because the labor was bestowed on his own materials and for himself, and not for the person who employed him. Per Bailey, 8 B. & C. 283.

ACCOUNT STATED.

An acknowledgment by the defendant that a certain sum is due from him to the plaintiff creates an implied promise to pay that sum, and will enable the plaintiff to recover it upon a count on an account stated. Freeman *v.* Hurst, 1 Term, 42; Knox *v.* Whalley, 1 Esp. 159; Dawson *v.* Remnant, 6 Esp. 24. So where the defendant said that he would call and settle the amount of an account

which had been sent to him, it was held sufficient. Clark *v.* Glennie, 3 Starkie, 10; S. C., 14 Eng. C. L. 147. It is not necessary that the defendant's admission should relate to more than one item or transaction, or that there should have been cross-dealings or accounts between the parties; an acknowledgment of a *debt*, though consisting only of one item, is sufficient. Peacock *v.* Harris, 10 East, 104; 2 Saund. 122, n.; Knowles *v.* Michel, 13 East, 249; Highmore *v.* Primrose, 5 M. & G. 65. The rule is that if a fixed and certain sum is admitted to be due to the plaintiff, for which an action would lie, it will be evidence to support a count upon an account stated. Porter *v.* Cooper, 1 C. M. & R. 387; 4 Tyr. 264; Ashby *v.* Ashby, 3 M. & P. 186; Lord Ellenborough, C. J., 5 M. & S. 67. I think Knowles *v.* Michel, 13 East, 249, is an authority to show that though in form a count upon an account stated is "of and concerning divers sums of money," yet proof of one item is good to maintain such a count; *divers* may be supported by evidence of one. The practice, I believe, has been so, and if there is any variation from it, it has arisen from not attending to the form of the count. This count does not import a mutuality of account, and there seems to be no more reason why an account should not be stated consisting of one item only as well as a plurality. Halroyd, J.: "It has been held that upon an account for goods sold and delivered, the plaintiff may prove a sale of one article, and that will be enough. The same rule applies to this count, which is 'of and concerning divers sums,' as to the count for goods sold. If the count is good, it is enough if the plaintiff prove any part of it." Kirbie *v.* Emerson, Clayton, 87; Holmes *v.* DeCamp, 1 Johns. 34; Montgomery *v.* Ivers, 17 Ib. 38. The acknowledgment by a defendant that a certain sum is due, raises an implied promise to pay the amount, and it is recoverable under a count for an account stated. Tassey *v.* Church, 4 Watts & Serg. 141; Gilson *v.* Stewart, 7 Watts, 100. If the account includes specialties, yet the balance found due may be recovered on a count for an account stated. Gilson *v.* Stewart, *supra;* Fitch *v.* Leitch, 11 Leigh, 471; Grant *v.* Healy, 3 Sumner, 523; Burnham *v.* Spooner, 10 N. H. 532.

But the acknowledgment must be made to the plaintiff, or his executor or agent, for when the person said to a third person that he owed a certain sum to the plaintiff, and that he was afraid he was going to put him to trouble, it was held insufficient to support an account stated. Breckon *v.* Smith, 1 Ad. & Ell. 488; S. C., 28 Eng. C. L. 125. It lies only when an account has been stated with

reference to past transaction. Therefore, where the landlord of an insolvent tenant got possession of the premises, in which there were fixtures belonging to the latter, and agreed to give up the possession to the assignees on their paying £7 rent due, the assignees, having taken possession of the fixtures, refused to pay the £7, the court held that it could not be recovered from them upon an account stated, as the agreement was not based upon any previous dealings between the parties. Clark *v.* Webb, 4 Tyr. 673; S. C., 1 C. M. & R. 29; Allen *v.* Cook, 2 Dow. P. C. 546. So when a partnership has been *dissolved* and a final balance of the account has been struck between the partners, and there has been a promise to pay the balance, it may be recovered under this count. Foster *v.* Allanson, 2 Term, 479; Henley *v.* Sloper, 8 B. & C. 20; S. C., 15 Eng. C. L. 147; Bishop *v.* Chambers, 3 C. & P. 55; S. C., 14 Eng. C. L. 207.

The acknowledgment of a sum due must be absolute, and not accompanied with any qualification or condition. Evans *v.* Verity, R. & M. 239; S. C., 21 Eng. C. L. 427; Wayman *v.* Hilliard, 7 Bing. 101; S. C., 20 Eng. C. L. 62; 4 M. & P. 729; Fidget *v.* Penny, 1 C. M. & R. 403. It must also expressly or by reference admit some *precise sum* as being due. Kiston *v.* Wood, 1 M. & R. 253; Teal *v.* Auty, 2 B. & B. 99; S. C., 6 Eng. C. L. 32; Benasconi *v.* Anderson, M. & M. 183; S. C., 22 Eng. C. L. 285; Green *v.* Davies, 4 B. & C. 235; S. C., 10 Eng. C. L. 319; Spencer *v.* Parry, 4 Nev. & M. 770; 3 Ad. & Ell. 331; 1 H. & W. 179; Leago *v.* Deane, 4 Bing. 459; S. C., 15 Eng. C. L. 39; 1 M. & P. 227; 3 C. & P. 17; S. C., 14 Eng. C. L. 255; Salmon *v.* Watson, 4 Moore, 73; S. C., 16 Eng. C. L. 363.

The sending of an account to the defendant and his keeping it, without making any objection, is an account stated.

MONEY PAID.

If one man pays or expends money for the use of another, he may, in general, recover it in an action for money paid. But to sustain such an action, it must appear that *money* has been paid by the plaintiff *at the request* of the defendant for his use; or in discharge of a debt, for which the defendant was originally liable to a third party. In order to recover on this count, the plaintiff must show an express or implied assent of the defendant to the payment of the money, or that it was paid on compulsion, or for the use of the defendant. Per Tyndall, C. J., in Grissell *v.* Robinson, 3 Bing. N. C. 15.

The request may be express, or implied, *first*, from the subsequent assent of the defendant; *secondly*, from the payment being made under compulsion of law, Johnson *v.* Mail Co., L. R., 3 C. B. 38, 43; and *thirdly*, from the defendant being under a legal obligation to pay the money advanced by the plaintiff.

The money must be paid; the giving a security unless negotiable, to pay is not enough, nor is the delivery of property. Taylor *v.* Higgins, 3 East, 169; Maxwell *v.* Jameson, 2 B. & A. 51; Power *v.* Butcher, 10 B. & C. 346; S. C., 21 Eng. C. L. 96; Lucket *v.* Bohannon,, 3 Bibb. 378; Morrison *v.* Berkey, 7 S. & R. 246; Doebler *v.* Fisher, 14 Ib. 179; Staymaker *v.* Gundacker, 10 Ib. 75; Kearney *v.* Tanner, 17 Ib. 94; Greathouse *v.* Throckmorton, 7 J. J. Marsh, 18; Turner *v.* Egerton, 1 Gill & Johns. 433, 436. *Aliter* where the property has been received as *money*. Ainslie *v.* Wilson, 7 Cowen, 662; Van Ostrand *v.* Reed, 1 Wend. 424; Stone *v.* Porter, 4 Dana, 207. If a surety in a note take up the old note and give his own for the amount, this is a payment which will support a count for money paid against the principal. Neale *v.* Newland, 4 Pike, 506; Moore *v.* Pyrke, 11 East, 52.

If A be indebted to B, and C pays the debt without the consent of A, express or implied, he can not recover it from A in an action for money paid, Stokes *v.* Lewis, 1 Term, 20; 1 Saund. 264, n,; Exall *v.* Partridge, 8 Term, 310; for one can not, by the voluntary payment of the debt of another, make himself creditor of that other. Richardson *v.* McRay, 1 Const. 472; Baltimore *v.* Hughes, 1 Gill & Johns. 497; Turner *v.* Egerton, 1 Ib. 433; Renssalear Glass Factory *v.* Reid, 5 Cowen, 603; Weakley *v.* Brahan, 2 Stew. 500; Rumney *v.* Ellsworth, 4 N. H. 138; Little *v.* Gibbs, 1 South. 213; Jones *v.* Wilson, 3 Johns. 434; Menderback *v.* Hopkins, 8 Ib. 436; Beach *v.* Vandenburg, 10 Johns. 361; Walkill *v.* Mamakating, 14 Ib. 87; Smith *v.* Crocker, 2 Root, 84; Wells *v.* Porter, 7 Wend. 119; Winson *v.* Savage, 7 Met. 346; Pearson *v.* Parker, 3 N. H. 366; 8 Johns. 202; 2 Vt. 213; 4 Pick. 447; 1 Hill, 234; 6 Greenl. 333; 7 Ib. 355; 1 Ib. 152.

If there be no previous request, it will be implied from a subsequent assent, upon the maxim *omnis rati habitio retrotrahitur et mandato æquiparatur*. Or if the plaintiff be under a legal obligation to make the payment; or if money is paid, for the use of a person who *is bound to pay it* under compulsion of law, a previous request will be implied. As when the plaintiff at request of attorney of defendant paid money on his account, and being told of it, did not object or disclaim, it was held that he was liable for the money, as

money paid to his use. Lightfoot *v.* Creed, 8 Taunt. 268; S. C., 4 Eng. C. L. 100. Where the goods of a stranger are on the premises of another and are there distrained for rent, and the owner pays the rent to redeem his goods, he can maintain an action for money paid against the lessees who owed the rent. Exall *v.* Partridge, 8 Term, 308; Wells *v.* Porter, 7 Wend. 119. On the same principle, where the indorser of a bill of exchange being sued by the holder, paid him part of the bill, it was held he might recover the same from the acceptor in an action for money paid. Pownall *v.* Ferrand, 6 B. & C., 439; S. C., 13 Eng. C. L. 230; Dawson *v.* Morgan, 9 B. & C. 618; S. C., 17 Eng. C. L. 457; Seaver *v.* Seaver, 6 C. & P. 673; S. C., 25 Eng. C. L. 591; Howes *v.* Martin, 1 Esp. 162. So where a person pays a bill for the honor of one of the parties, he may recover the amount from the person for whose use he paid it. Smith *v.* Nissen, 1 Term, 269; Bleaden *v.* Charles, 7 Bing. 246; S. C., 20 Eng. C. L. 119; Hales *v.* Freeman, 1 B. & B. 391; S. C., 5 Eng. C. L. 131; Jenkens *v.* Tucker, 1 H. Bl. 90; Foster *v.* Ley, 2 Bing N. C. 260; S. C., 29 Eng. C. L. 331; Alexander *v.* Vane, 1 M. & W. 511; Brown *v.* Hodgson, 4 Taunt. 189; Sill *v.* Laing, 4 Campb. 81; Dawson *v.* Linton, 5 B. & A. 521; S. C., 7 Eng. C. L. 179.

Where one is surety for another and is compelled to pay the debt, he may recover it in an action on account for money paid, for the law in such a case implies a promise on the part of the principal to pay the surety for the money thus paid by him for the use of the principal. Toussaint *v.* Mortimant, 2 Term, 104. In all cases where one of two or more joint sureties pays money, which either of them might be called on to pay, he can in this form of action recover of each surety his proportion of the sum so paid Cornell *v.* Edwards, 2 B. & P. 268; Deering *v.* Earl of Winchelsea, Ib. 270. But if any of the sureties are insolvent, he must go into equity to make the solvent ones pay the proportionate share of the insolvent ones. Brown *v.* Lee, 6 B. & C. 689; S. C., 13 Eng. C. L. 294; Peter *v.* Rich, 1 Ch. Cas. 34, 696; Bosley *v.* Taylor, 5 Dana, 157; Johnson *v.* Johnson, 11 Mass. 359; Batchelder *v.* Fiske, 17 Ib. 464; Crowders *v.* Shelby, 6 J. J. Marsh. 62; Mitchel *v.* Sproul, 5 Ib. 270; Lidderdale *v.* Robinson, 2 Brock. 160; Harris *v.* Ferguson, 2 Bailey, 397; 1 Hill, 282; Taylor *v.* Savage, 12 Mass. 98. There is no contribution between *tort feasors.* 1 Leigh N. P. 75; Merryweather *v.* Nixon, 8 Term, 186; Colborne *v.* Patmore, 1 C. M. & R. 72; Betts *v.* Gibbens, 4 Nev. & M. 77; Adamson *v.* Jarvis, 4 Bing. 66; S. C., 13 Eng. C. L. 343; Shackell *v.* Rosier, 2

Bing. N. C. 634; S. C., 29 Eng. C. L. 438; Sadler *v.* Nixon, 5 B. & Ad. 936; S. C., 29 Eng. C. L. 247.

Where one becomes joint surety with plaintiff at his request, the plaintiff can not call on him to contribute. Daniel *v.* Ballard, 2 Dana, 296; Byers *v.* McClanahan, 6 Gill & Johns. 256; Blake *v.* Cole, 22 Pick. 97. If two joint obligors be sued, and one of them gives bail, such bail can not, upon being compelled to pay the debt, sustain an action against the other obligor for money paid. Osborn *v.* Cunningham, 4 Dev. & Batt. 423.

No right of action accrues to one surety, who has paid the debt, against the other till notice is given the co-surety. Carpenter *v.* Kelly, 9 Ohio, 106.

MONEY HAD AND RECEIVED.

In general, whenever the defendant has received money which is the property of the plaintiff, and which the defendant is obliged, by the ties of natural justice and equity, to refund, it may be recovered from him in an action for money had and received to the plaintiff's use. Per Lord Mansfield, C. J., in Moses *v.* Macfarlen, 2 Burr, 1012. This form of action has been extended on the principle of its being considered like a bill in equity. In order to recover, the plaintiff must show that he has equity and conscience on his side, and that he could recover in a court of equity.

In many cases, where the defendant has received money which belonged to the plaintiff, under circumstances which would render him liable in an action *ex delicto*, the plaintiff may waive the *tort*, and sue in an action for money had and received. Where one man has money which equitably belongs to another, it may generally be recovered in an action for money had and received to the use of the plaintiff; and even where money is received after and in consequence of an act of trespass, in many cases the *tort* may be waived, and the money itself sought in a suit as received to the use of the plaintiff. Rickey *v.* Hinde, 6 Ohio, 371, 379. The whole extent of the doctrine of waiving a *tort* and bringing an action for money had and received, is, that one whose goods have been taken from him, or detained unlawfully, whereby he has a right to an action of trespass or trover, may, if the wrong-doer sell the goods and receive the money for them, waive the *tort*, affirm the sale, and maintain this action for the money had and received by the wrong-doer for the goods so sold. Jones *v.* Hoar, 5 Pick. 285; Willet *v.* Willet, 3 Watts, 277; Pritchard *v.* Ford, 1 J. J. Marsh. 543; Saunders *v.* Hamilton, 3 Dana, 552; Stocket *v.* Watkins, 2 Gill & Johns. 326; Bank of North America *v.* McCall, 4 Binn. 374;

Webster *v.* Drinkwater, 5 Greenl. 319, 323; Chauncey *v.* Yeaton, 1 N. H. 151; Morrison *v.* Rogers. 2 Scam. 317; 10 Watts, 431; 1 Smedes & M. 31; 5 Hill, 577. So where there is a contest between two persons as to which has the right to an office, and one is in possession, and has received the salary or fees attached to it, the other may sue the one in possession for money had and received to his use, and if the plaintiff succeed in proving his right to the office, he can recover the amount of money the defendant has received as salary or fees on a count for money had and received. Being entitled to the office, the money so received is the plaintiff's, and in equity the defendant received it for the plaintiff's use. 1 Leigh N. P. 45; Roland *v.* Hall, 1 Hodges, 111; 1 Scott, 539; Bayter *v.* Dodsworth, 6 Term, 681; Powell *v.* Millbank, 1 Term, 399, note; Green *v.* Hewett, Peake, 182.

The courts, however, will not allow the title to land to be tried in this form of action. Therefore, rents received by one holding adversely are not recoverable under this form of action. 1 Leigh P. P. 46.

Money must have been received.—It must appear that the defendant received *money* for the use of the plaintiff. Any other consideration will not be sufficient to sustain this action. Wharton *v.* Walker, 4 B. & C. 163; S. C., 10 Eng. C. L. 302; Moore *v.* Pyrke, 11 East, 52; Maxwell *v.* Jameson, 2 B. & A. 51; Davies *v.* Watson, 2 N. & M. 709; S. C., 28 Eng. C. L 377; Green *v.* Rowan, 7 C. & P. 119. If it were necessary to consider the question whether anything short of the actual receipt of *money* would sustain this action for money had and received, we should find little difficulty in deciding that *that*, which was equivalent to money, or had been available to the party as such, would sustain the action. Graham *v.* Bank of U. S., 5 Ohio, 265, 266. Where a party bids off property at a public sale, or sale on execution, to protect a previously purchased title, persons interested in the proceeds of the sale may consider it as money in his hands received for their use, and recover what of it belongs to them severally, in an action for money had and received. Ib. And negotiable promissory notes received by the defendant are often regarded as money. Floyd *v.* Day, 3 Mass. 405; Hemmenway *v.* Bradford, 14 Mass. 122; Willie *v.* Green, 2 N. H. 333; Clark *v.* Penney, 6 Cowen, 297; Murray *v.* Pate, 6 Dana, 335; Hathaway *v.* Burr, 8 Shepley, 567; Hatton *v.* Robinson, 4 Blackf. 479; Haskins *v.* Dunham, An-

thon, 81. What the defendant has received as money to him, is money to be recovered in this form of action. Such now seems to be the settled rule.

Money obtained or paid by mistake.—Money paid under a mistake or ignorance, but with a knowledge of the facts, or with the means of such knowledge, can not be recovered back. Elliot *v.* Swartwout, 10 Peters, 137; Mowatt *v.* Wright, 1 Wend. 355; Clark *v.* Dutcher, 9 Cowen, 674; Hubbard *v.* Martin, 8 Yerg. 498; Jones *v.* Watkins, 1 Stew. 81; Dickens *v.* Jones, 6 Yerg. 483; Elting *v.* Scott, 2 Johns. 157; Ladd *v.* Kenney, 2 N. H. 341; Lee *v.* Stuart, 2 Leigh, 76. But not ignorance of the law of a foreign country, or of another State of the Union. Haven *v.* Foster, 9 Pick. 112; Norton *v.* Marden, 3 Shepley, 45. In this class of cases, there was once a contract, or legal liability, which has been terminated by a state of facts, and it is ignorance of the legal effect of these facts which prevent a recovery; the party paying supposing on the facts he is still liable, when in law he is not. Mayor *v.* Judah, 5 Leigh, 305; Bean *v.* Jones, 8 N. H. 149; Filgo *v.* Penney, 2 Murph. 182; Norton *v.* Marden, 3 Shepley, 45; 1 Ala. 406; 9 Watts, 462; Osgood *v.* Jones, 28 Maine, 312; 3 B. Mon. 510; Glover *v.* Collins, 3 Harr. 232; Goddard *v.* Putnam, 22 Maine, 363; Bank *v.* Ballard, 7 How. (Miss.) 371; Wheadon *v.* Olds, 20 Wend. 174. In Ohio, a mistake of law in drawing up a contract may be relieved against in chancery. Williams *v.* Champion, 6 Ohio, 169; Young *v.* Miller, 10 Ohio, 85; McNaughten *v.* Patridge, 11 Ohio, 223, 232; Evants *v.* Strode's Adm'r, 11 Ohio, 480. If such a mistake can be corrected in equity, in a written agreement, such a mistake must be held not to prejudice a party paying money.

The rule in regard to this subject of money paid by mistake is thus stated by Lord Mansfield, C. J., in Bizo *v.* Dickason, 1 Term, 285. He said that, "if a man has actually paid what the law would not have compelled him to pay, but what in equity and conscience he ought, he can not recover it back in an action for money had and received. So where a man has paid a debt which would otherwise have been barred by the statute of limitations, or a debt contracted during his infancy, which in justice he might discharge, though the law would not have compelled payment; yet, the money being paid, it will not oblige the payee to refund it. But where money is paid under a mistake, which there is no ground to claim in conscience, the party may recover it back again in this form of

action." So money paid on a *void* bill may be recovered back. Milner *v.* Duncan, 6 B. & C. 671; S. C., 13 Eng. C. L. 293. So when one has paid rent to A, and is then ejected, and has to pay mesne profits for the same time the rent covered, he may recover the money back, A not setting up any title to the land at the trial. Newsome *v.* Graham, 10 B. & C. 234; S. C., 22 Eng. C. L. 63; Hodson *v.* Williams, 6 Esp. 29; Brydges *v.* Walford, 6 M. & S. 42. So, if a sheriff pays the money made on execution to the plaintiff, knowing he has committed an act of bankruptcy, the assignees can recover it back from the sheriff or plaintiff in this form of action. Notley *v.* Buck, 8 B. & C. 160; S. C., 15 Eng. C. L. 178. So where an account was by mistake overpaid. Lucas *v.* Warswick, 1 M. & Rob. 293.

Money paid on a forged instrument.—If a party, exercising due caution, has, by mistake, paid money on a forged instrument, and has been guilty of no laches, whereby the rights of a third party have been affected, he may recover back the sum so paid in an action for money had and received; as when the plaintiff discounted a forged navy bill for the defendant, both parties being at the time ignorant of the forgery, it was held that he might recover back the amount in an action of this kind. Jones *v.* Ryde, 5 Taunt. 488; S. C., 1 Eng. C. L. 166; Bruce *v.* Bruce, 5 Taunt. 495; S. C., 1 Eng. C. L. 170; Fuller *v.* Smith, R. & M. 49; S. C., 21 Eng. C. L. 379. So, where one paid a bill for the honor of a customer, and discovering the forgery and notifying at once the holder and demanding the repayment of the money, that he might recover back the money as paid by mistake, the mistake having been discovered in time to give notice to all parties liable thereon. Wilkinson *v.* Johnston, 3 B. & C. 428; S. C., 10 Eng. C. L. 140. So, where one of two partners obtained money on a note payable at a future day, signed by him with the name of the firm, and with a forged indorsement of a third person, the lender was held entitled, on discovering the forgery, to an action for money had and received against the firm. Man. & Mech. Bank *v.* Gore, 15 Mass. 75; Boardman *v.* Gore, 15 Ib. 331; Wilson *v.* Alexander, 3 Scam. 392; Canal Bank *v.* Bank of Albany, 1 Hill, 287; Talbot *v.* Bank of Rochester, 1 Ib. 295; Coggill *v.* The American Exchange Bank, 1 N. Y. 113; 86 Eng. C. L. 314. But where a bill is paid by the drawees to a *bona fide* holder, for a valuable consideration, the drawee can not recover back the money. The drawee and acceptor ought to know the signature of the drawers. Price

v. Neal, 3 Burr, 1354; Wilkinson *v.* Johnston, 3 B. & C. 434; S. C., 10 Eng. C. L. 142. So, when a banker, at whose house a bill purporting to be accepted by one of his customers was made payable, paid the amount to a *bona fide* holder, and did not discover until a week after that it was a forgery, it was held that he could not recover the sum paid from such holder, for he ought to know the signature of his customer; and, by his delay in discovering the mistake, he deprived the holder of a remedy against the other parties to the bill. Smith *v.* Mercer, 6 Taunt. 76; S. C., 1 Eng. C. L. 312; Young *v.* Grote, 4 Bing. 258; S. C., 13 Eng. C. L. 420. The same principle maintained and applied in the case of Ellis & Morton *v.* Ohio Life Ins. and Trust Co., 4 Ohio St. 628; Hall *v.* Fuller, 5 B. & C. 750; S. C., 12 Eng. C. L. 368. So, where one stock was sold under a power forged by one of a firm, it was held that the owner of the stock might recover the money of the innocent partners of the forger, who received the proceeds of the sale. Marsh *v.* Keating, 1 Bing. N. C. 198; S. C., 27 Eng. C. L. 354.

On failure of consideration.—Money paid on a consideration which subsequently failed, may, in general, be recovered back in an action for money had and received.

Where a deed granting an annuity was set aside for informality in registering the memorial, it was held that an action for money had and received would lie to recover back the purchase money. Shone *v.* Webb, 1 Term, 732; Scurfield *v.* Gowland, 6 East, 241; Waters *v.* Mansell, 3 Taunt. 56; Cowper *v.* Godmond, 9 Bing. 748; S. C., 23 Eng. C. L. 452. So, where money has been paid in aid of a scheme which was abandoned, it was held that the subscribers could recover back what they had severally paid. Nockells *v.* Crosby, 3 B. & C. 814; S. C., 10 Eng. C. L. 237.

Where some act is to be done by each party, under a special agreement, and the defendant, by his neglect, prevents the plaintiff from executing the agreement, the plaintiff may, in this form of action, recover back any money he has paid under it. Giles *v.* Edwards, 7 Term, 181. But if the contract has been in part performed, and the plaintiff has derived any advantage from it, this action can not be maintained. Ib.; Brinley *v.* Tibbets, 7 Greenleaf, 70. So money paid on a parol contract for purchase of lands may be recovered back on account for money had and received, if the vendor refuse or neglect to execute the contract. Buck *v.* Waddle, 1 Ohio, 357. So money paid in advance on account of labor to be done, may be recovered back in this form of action, in

case of non-performance. Wheeler *v.* Board, 12 Johns. 363; Davis *v.* Marston, 5 Mass. 199. So money paid for goods which do not answer the description sold, may, on goods being returned or tendered back, be recovered back in this form of action. Bradford *v.* Manley, 13 Mass. 139; Connor *v.* Henderson, 15 Mass. 319; Martin *v.* Howell, 2 Const. 750. So where the contract of sale is rendered void by the fraud of the seller, and which the buyer has rescinded by a seasonable return or offer to return. Kimball *v.* Cunningham, 4 Mass. 502; Norton *v.* Young, 3 Greenl. 30. Where the property is of any value, there must first be a return or offer to return, Warren *v.* Wheeler, 1 Chip. 159; Wharton *v.* O'Hara, 2 N. & M. 65; unless there has been an entire failure of consideration. Byers *v.* Bastick, 2 Const. 75. Nott, J., in Wharton *v.* O'Hara, *supra*, says: "I apprehend it is well settled that a person can not recover on a single count for *money had and received*, unless there has been a return of the property, or at least a *tender* of it, or where there has been an *entire failure* of consideration." French *v.* Millard, 2 Ohio St. 44; Creps *v.* Baird, 3 Ib. 277. The plaintiff must be in a situation to restore the defendant that for which the money was paid, or show that the defendant prevented it. Reed *v.* McGrew, 5 Ohio, 386. Where the entire consideration fails, money paid may be recovered back in this form of action. Spring *v.* Coffin, 10 Mass. 34; Lacoste *v.* Flotard, 1 Const. 467; Duncan *v.* Bell, 2 N. & McCord, 153; Pettibone *v.* Roberts, 2 Root, 258; Neel *v.* Deans, 1 N. & McC. 210. Money paid on a parol contract for land, when the vendor fails to convey, may be recovered back. Hunt *v.* Sanders, 1 Marsh. 552; Allen *v.* Barker, 2 Stew. 21; Maddera *v.* Smith, 3 Ib. 119; Grant *v.* Craigmiles, 1 Bibb, 206; Bedenger *v.* Whittamore, 2 J. J. Marsh. 563; DeUtriecht *v.* Melchor, 1 Dall. 428; Wilson *v.* Jordan, 3 Stew. & P. 92. Where the money is paid on a quitclaim deed, the money can not be recovered back, though the title is defective, unless there be fraud in vendor. Gates *v.* Winslow, 1 Mass. 65; Higley *v.* Smith, 1 Chip. 409; Wallis *v.* Wallis, 4 Mass. 135; Emerson *v.* Wash Co., 9 Greenl. 94; Coggill *v.* Exchange Bank, 1 N. Y. 113; 37 N. Y. 332, Patrick *v.* Metcalf; Colvin *v.* Holbrook, 2 N. Y. 126; L. R. 3. Q. B. 753.

Money obtained by fraud.—Whenever the defendant has received money belonging to the plaintiff under any fraud, false color, deceit, duress, extortion, or oppression, the plaintiff may recover it back in an action of this kind; for he may waive the *tort* and rely on the contract, which the law in such a case implies for him. 1 Leigh

N. P. 62; 1 Campb. 124; Abbotts *v.* Barry, 2 B. & B. 369; S. C., 6 Eng. C. L. 157; Harrison *v.* Walker, Peake, 111; Bristow *v.* Eastman, Ib. 223; Hagan *v.* Shee, 2 Esp. 522; Dupen *v.* Keeling, 4 C. & P. 102; S. C., 19 Eng. C. L. 295; Robson *v.* Eaton, 1 Term, 62.

If the defendant, having taken advantage of the plaintiff's situation, obtain money from him by compulsion, to which in justice he is not entitled, the plaintiff may recover it back in this form of action. Fulham *v.* Down, 6 Esp. 26; Codaval *v.* Collins, 6 N. & M. 329. So a voluntary payment of an illegal demand to redeem the person, or the goods, may be the subject of such an action. Chase *v.* Dwinal, 7 Greenleaf, 134. Weston, J., in this last case, says: "It has been laid down as a general principle, that an action for money had and received lies for money got through imposition, extortion, or oppression, or an undue advantage taken of the party's situation. Moses *v.* McFarlane, 2 Burr, 1005; Smith *v.* Bromley, Doug. 696. In Astley *v.* Reynolds, 2 Strange, 916, an action was sustained to recover money, extorted by a pawnbroker, for the redemption of plate; notwithstanding it was objected that the payment was voluntary. In Hall *v.* Schultz, 4 Johns. 240, Spencer, J., says this case has been overruled by Lord Kenyon in Knibbs *v.* Hall, 1 Esp. 84. There the plaintiff had paid, as he insisted, five guineas more rent than could have been rightfully claimed of him to avoid a distress which was threatened. Lord Kenyon held this to be a voluntary payment, and not upon compulsion; as the party might have protected himself from a wrongful distress by replevin. His lordship does not advert to the case of Astley *v.* Reynolds; and subsequently in Cartwright *v.* Rawley, 2 Esp. 723, he refers with approbation to an action within his recollection, for money had and received, brought against the steward of a manor, to recover money paid for producing at a trial some deeds and court-rolls, for which he had charged extravagantly. It was urged that the payment was voluntary; but it appearing that the party could not do without the deeds, and that the money was paid through the urgency of the case, the action was sustained. Had the distress threatened in Knibbs *v.* Hall been actually made, money paid to relieve the goods could have been recovered in *assumpsit* upon a principle, which will be subsequently noticed.

"In Stevenson *v.* Mortimer, Cowper, 805, the plaintiff recovered in an action for money had and received, an excess of fees by him paid to a custom-house officer, to obtain a document he was under the necessity of procuring.

"In Ripley *v.* Gelston, 2 Johns. 201, the plaintiff recovered in *assumpsit* of the collector of New York, money illegally claimed by him as tonnage and light money, and which the plaintiff paid to obtain a clearance of his vessel. In Clinton *v.* Strong, 9 Johns. 370, money was reclaimed, which had been wrongfully exacted by the clerk of the District Court, for the redelivery of property which had been seized. In the foregoing cases, the payments were not deemed voluntary, but extorted and compulsory.

"It may be insisted that trespass or replevin would have been more appropriate remedies for the plaintiff. Either might doubtless have been maintained; and when they are specific remedies provided by law for a peculiar class of injuries, *assumpsit* can not be substituted. It was upon this ground that Lindon *v.* Hooper, Cowper, 414, was decided. Cattle damaged pens, and had been wrongfully distrained; money had been paid for their liberation, and an action for money had and received brought to recover it. The action did not prevail. The court place their opinion expressly on the nature of the remedy by distress, which they say is singular and depends upon a peculiar system of strict positive law; that the distrainor has a certain course prescribed to him, which he must take care formally to pursue; and that the law has provided two precise remedies for the owner of the cattle, which may happen to be wrongfully distrained—replevin, and, after paying the sum claimed, trespass, in which such payment must be specially averred and set forth as an aggravation of the trespass. These are to follow the pleadings, which put directly in issue the validity of the distress. From a case of this peculiar character, decided upon this special ground, no general principle can be extracted, which can govern cases where the law of distress does not apply.

"Irving *v.* Wilson, 4 D. & E. 485, is a case strongly resembling the one now before the court. A revenue officer seized goods, not liable to seizure, but demanded money for their release, which the owner paid. This was recovered back in an action for money had and received. It was held to be a payment not voluntary, but by coercion, the defendant having the plaintiff in his power, by stopping his goods. It does not appear to have occurred to the counsel or the court that it was a case, which was affected by the decision in Lindon *v.* Hooper.

"Trespass would have been an appropriate remedy for the unlawful seizure; but after payment, *assumpsit* was also appropriate. The money was extorted. The payment was not voluntary in any fair sense of that term; and the defendant had no just title to retain

it. If money is voluntarily paid to close a transaction, without duress either of person or goods, the legal maxim, *volenti non fit injuria*, may be allowed to operate. It would be a perversion of the maxim to apply it for the benefit of a party who had added extortion to unjustifiable force and violence.

"The party injured often finds a convenience in being allowed to select one of several concurrent remedies. In the case under consideration, replevin would have restored the property unlawfully seized. But to procure a writ, and an officer to serve it, would have occasioned delay, which might have subjected the plaintiff to greater loss than the payment of the money demanded. Besides, he must have given a bond to the officer to prosecute his suit, and he might meet with difficulty in obtaining sufficient sureties. Had he brought trespass, several months might have elapsed before he could have obtained a final decision; and this delay might have been attended with serious inconvenience. By the course pursued, these difficulties were avoided. Nor is the defendant placed by it in any worse condition. He has been permitted to urge in his defense any claim of right under the corporation, and he is liable to pay only the money actually received by him, the plaintiff waiving, by the form of the action, damages for the illegal seizure."

The facts in the above case were, that the plaintiff was conducting a raft down the Penobscot river, and when he came near the boom of the defendant, which was erected under a state charter, he was unable to pass it through the passage-way left for that purpose; and, by force of the wind and current, it was forced eastward of the passage, and stopped by defendant's boom. The defendant demanded of plaintiff $6.40, being the regular boomage for the raft, which plaintiff refusing to pay, the defendant detained the raft till he did pay the sum demanded. The action was brought to recover back this money so paid; and it was held money not paid voluntarily.

This subject was well considered by the Supreme Court of Ohio in *May v.* Cincinnati, 1 Ohio St. 268; in which, after citing many authorities, it is said: "This unbroken chain of authority seems to warrant the conclusion that a payment of money upon an illegal or unjust demand, when the party is advised of all the facts, can only be considered involuntary when it is made to procure the release of the person or property of the party from detention, or when the other party is armed with apparent authority to seize upon either, and the payment is made to prevent it. But where he can only be reached by a proceeding at law, he is

bound to make his defense in the first instance." So where an assessment was made to improve a street, and the parties assessed paid under protest, it was held it could not be recovered back in this form of action, because the corporation could obtain the assessment only by an action, to which the party could set up his defense. City of Marietta *v.* Slocum, 6 Ohio St. 471.

In the case of Atlee *v.* Backhouse, 3 Mee. & Wels. 644, Lord Abinger, C. B., states the result of all the English cases to be, that in all cases where goods of the party have been wrongfully seized or detained for the purpose of exacting money, he is entitled, after payment of the money, to bring an action for money had and received to try the right. And in the very recent case of Oates *v.* Hudson, 5 Eng. L. & Eq. 470, the rule, as laid down in the above case, was approved by the whole court. Boston and Sandwich Glass Co. *v.* The City of Boston, 4 Met. 181. In this last case, a tax illegally assessed, having been paid under protest, was recovered back, because the collector had a right to seize property in the first instance without resorting to an action. Cases where it has been held the money was paid voluntarily, and could not be recovered back: Brisbane *v.* Dacres, 5 Taunt. 143; Wilson *v.* Roy, 10 Ad. & El. 82; Elliot *v.* Swartwout, 10 Pet. 150; Clark *v.* Dutcher, 9 Cowen, 674; Silliman *v.* Wing, 7 Hill, 159; Abell *v.* Douglass, 4 Denio, 308; Fleetwood *v.* New York, 2 Sandf. S. C. 475; Baltimore *v.* Lefferman, 4 Gill, 425; Morris *v.* Baltimore, 5 Gill, 244; Robinson *v.* Charleston, 4 Rich. 317; Smith *v.* Readfield, 27 Maine, 145. This case in 27 Maine, 145, is contrary to the case of Boston and Sandwich Glass Co. *v.* Boston, 4 Met. 181. The court seem to put the case on the ground that the collector made no threat of seizure before payment. This is surely unnecessary, when the plaintiff knew it was his duty to make a seizure; it is certainly absurd to require this foolish act before payment can be made. The last case is rightly decided. Cadaval *v.* Collins, 6 N. & M. 324; Brown *v.* McKinally, 1 Esp. 279; 17 Mass. 461; 12 Pick. 206; 4 Ib. 361; 6 Conn. 223; 12 Pick. 7; 10 Conn. 127. So if one demands an excess of fees. 2 N. H. 241.

Money paid on an illegal contract.—The rule in respect of money paid on illegal contracts, appears in general to be, that money so advanced may be recovered back in an action for money had and received while the contract remains *executory*, because a violation of the law is thereby prevented; but if the contract be executed, it can not be recovered back. Where *both parties* are in *pari de-*

licto, in such a case, *melior est conditio defendentis;* not because the defendant is more favored, but because the plaintiff must draw his justice from pure fountains. Buller N. P. 132; per Lord Mansfield, C. J., Doug. 470; Perkins *v.* Garvige, 15 Wend. 412.

Where one knowingly pays money on an illegal consideration, he is *particeps criminis*, and there is no reason he should have his money again, for he parted with it freely, and *volenti non fit injuria*.

But where contracts or transactions are prohibited by positive statute, for the sake of protecting one set of men from another set of men, the one, from their situation and condition, being liable to be oppressed or imposed upon by the other, *there* the parties are not in *pari delicto;* and in furtherance of these statutes, the person injured, after the transaction is finished and completed, may bring his action, and defeat the contract; the object of the statute being to protect the plaintiff. Buller N. P. 131; 1 Leigh N. P. 66, per Lord Mansfield, C. J.; Browning *v.* Morris, Cowper, 792. Where A, in consideration of £200 paid by B, gave a bond for the payment of an annuity to the latter of 100 guineas, until the hop duties should amount to a certain sum in one year, on an action to recover back the £200, it was held a wager and void, and the money was recovered back. Tappenden *v.* Randall, 2 Bos. & Pul. 467; Atherford *v.* Beard, 2 Term, 610; Shirley *v.* Sankey, 2 Bos. & Pul. 130. Contracts between lottery-office keepers, who entered into an agreement about the drawing of tickets, the parties were held to be in *pari delicto*. Lowry *v.* Bourdieu, Doug. 467; Howson *v.* Hancock, 8 Term, 575; Hastelow *v.* Jackson, 8 B. & C. 225; S. C., 15 Eng. C. L. 205; Williams *v.* Hedley, 8 East, 378; Thistlewood *v.* Cracroft, 1 M. & S. 500; Stokes *v.* Twitchen, 8 Taunt. 492; S. C., 4 Eng. C. L. 183; Clayton *v.* Dilly, 4 Taunt. 165. Money paid on an agreement entered into on Sunday, may be recovered back, so long as the contract remains executory; otherwise, if the agreement has been executed. Brown *v.* Timmany, 20 Ohio, 81; Worcester *v.* Eaton, 11 Mass. 376. Illegal interest paid may be recovered back where it is illegal to take it. Boardman *v.* Roe, 13 Mass. 105; Bond *v.* Hays, 12 Ib. 35; Wheaton *v.* Hibbard, 20 Johns. 290; Bearce *v.* Barstow, 9 Mass. 48.

Money fairly paid over to the winner in case of an illegal and void wager, can not be recovered back. Perkins *v.* Eaton, 3 N. H. 152; Rust *v.* Gott, 9 Cow. 169; McCullum *v.* Gourlay, 8 Johns. 147; Livingston *v.* Wootan, 1 N. & McC. 178. *Aliter*, if the money is in the hands of a stake-holder, or if he pay it over after notice to

detain it. Vischer *v.* Yates, 11 Johns. 23; Perkins *v.* Hyde, 6 Yerger, 228; 3 N. H. 152; 1 N. & McC. 178; Jacobs *v.* Walton, 1 Har. 496. Where the *parties* are in *pari delicto*. Greenwood *v.* Curtis, 6 Mass. 381; Barnard *v.* Crane, 1 Tyler, 457; Burt *v.* Place, 6 Cow. 431; Pearson *v.* Lord, 6 Mass. 84; Babcock *v.* Thompson, 3 Pick. 446; Merwin *v.* Huntington, 2 Conn. 209; Best *v.* Strong, 2 Wend. 319; Groton *v.* Waldoborough, 11 Maine, 306; Denny *v.* Lincoln, 5 Mass. 385.

Money paid on legal process.—Money paid on a judgment that is afterwards reversed or vacated, may be recovered back in this action. Homer *v.* Barrett, 2 Root, 156; Duncan *v.* Kirkpatrick, 13 S. & R. 292; Sturges *v.* Allis, 10 Wend. 354; Duncan *v.* Ware, 5 Stew. & Port. 119; Green *v.* Stone, 1 Har. & J. 405; Clark *v.* Penney, 6 Cow. 297; Jamaica *v.* Guilford, 2 Chip. 103; Dennett *v.* Nevers, 7 Greenl. 399. So money paid on an execution issued on a satisfied judgment, Wisner *v.* Bulkley, 15 Wend. 321; More *v.* Trumbour, 5 Cow. 488; can not be recovered from assignee of judgment. Lyman *v.* Edwards, 2 Day, 153; Horn *v.* Johns, 2 Munf. 272.

But where the judgment not void, remains in force, money paid on it can not be recovered back. Munson *v.* Bacon, 1 Root, 210; Morton *v.* Chandler, 7 Greenl. 45; Loring *v.* Mansfield, 17 Mass. 394; Carter *v.* Canterbury, 3 Conn. 461; Homer *v.* Fish, 1 Pick. 439; Peck *v.* Woodbridge, 3 Day, 36; Cobb *v.* Curtis, 8 Johns. 470; White *v.* Ward, 9 Johns. 232. It matters not how false in fact the recovery may be. Holden *v.* Curtis, 2 N. H. 61. Payments not credited on a note, and not allowed in entering up the judgment, can not be recovered back; the judgment being conclusive evidence on what was due. Loring *v.* Mansfield, 17 Mass. 394; De Sylva *v.* Henny, 3 Porter, 132; 7 Mass. 24; Tilton *v.* Gordon, 1 N. H. 33; 12 Mass. 271; 16 Mass. 306.

In other cases.—Where one receives the money of another for a particular purpose, and applies it to his own use, or refuses to apply as ordered, it may be recovered back in this form of action. Wales *v.* Wetmore, 3 Day, 252; McNeilly *v.* Richardson, 4 Cow. 607; Dumond *v.* Carpenter, 3 Johns. 783; Eastman *v.* Hodges, 1 Chip. 101; Guthrie *v.* Hyatt, 1 Har. 446.

If an agent receive money to which his principal has no right, he can not pay it over to him after notice; if he does, he still remains liable for it; if he pays it over before notice not to do so,

the suit can not be against him, but against the principal. Garland *v.* Salem Bank, 9 Mass. 408; Trye *v.* Lockwood, 4 Cow. 454; Fowler *v.* Shearer, 7 Mass. 14; Dickens *v.* Jones, 6 Yerg. 483; Elliott *v.* Swartwout, 10 Peters, 137; Pool *v.* Adkinson, 1 Dana, 117; Potter *v.* Bemis, 1 Johns. 515; United States *v.* Buford, 3 Peters, 28; Hefferman *v.* Grymes, 2 Leigh, 512.

It lies against an officer, who receives money on execution. Armstrong *v.* Garrow, 6 Cow. 465; Overton *v.* Hudson, 2 Wash. 192.

If a public agent receives money from the government to be paid on a particular claim or to a particular person, and fails so to do, the party to whom he ought to have paid it, may sue the agent for it in this form of action. Freeman *v.* Otis, 9 Mass. 272; Chapman *v.* Williams, 7 Har. & J. 157; Arnold *v.* Lyman, 17 Mass. 400; Owings *v.* Owings, 1 Har. & Gill, 484; Hall *v.* Marston, 17 Mass. 575; Weston *v.* Barker, 12 Johns. 276; Stockdon *v.* Bayless, 2 Bibb, 62.

A stole property and sold it to B for money; on being arrested for the theft by the owner of the property, A gave him this money. B recovered the money of the owner of the property without proving previous demand. Wiggin *v.* Foss, 4 N. H. 294.

This abstract of the law on the common counts will enable one to obtain a general notion of their use and application. Still it is necessary for the student to study the law in works devoted to their elucidation, and the numerous cases which have been decided in relation to them. The common counts were a necessity under the old practice, and equally so under the new. They are not liable to technical difficulties, and all variance is avoided on the trial. The sum claimed being stated, and what it is for, any accounts may be gone into in order to ascertain whether at the time named, there was any, and if any, what balance due growing out of all previous transactions coming in under the particular count.

There was a practice of suing on the common counts and offering a note or bill in evidence. I don't think that can be done now. But when the note is only conditional payment, and has not been paid, it would seem an action might be brought on the original cause of action. The code does not change the law as to the right of parties; hence, when before the code, the note or bill was not payment in fact, and has not been paid, I can see no reason why a suit may not be brought on the original cause of action. This class of cases arise oftenest on a sale of goods, and a note at the time or afterward is given; if not paid, the plaintiff has his election to sue on the note, or for goods sold and delivered. The code

has not changed the legal effect of such transaction, and hence such an unpaid note is no payment of the contract of sale.

But if the party relies on his note to prove his cause of action, he must declare on the note or bill; he can not declare on common counts and prove them by the note. A note was held evidence of money had and received: it is so no longer; if relied on, it must be declared on.

I. *Respecting Real Property.*

1. FOR REAL ESTATE SOLD.

The said A B, plaintiff, complains of the said C D, defendant, for that the said defendant, on the day of , A. D. 18 , (*this should be the date of the debts becoming due, so as after that to carry interest,*) was indebted to the said plaintiff in the sum of $, (*this should be the true amount claimed without interest,*) for certain real estate before that time bargained, sold, and conveyed (*if it has been conveyed or a deed tendered*) by the said plaintiff to the said defendant at his special instance and request, and which said sum of money the said plaintiff avers was then due and payable; yet the said defendant, though often requested, has not paid said sum of money, nor any part thereof.

Wherefore the said plaintiff prays judgment against the said defendant for said sum of $, together with interest thereon from the said day of , A. D. 18 , (*the day the indebtedness became payable.*)

2. FOR LEASEHOLD ESTATE.

The said A B, plaintiff, complains of the said C D, defendant, for that the said defendant on the day of , A. D. 18 , was indebted to the said plaintiff in the sum of $,* for certain leasehold premises with the appurtenances, before that time bargained, sold, and assigned by the said plaintiff to the said defendant, at his special instance and request, for the remainder of a certain term of years then to come and unexpired therein, and which said sum of money the said plaintiff avers was then due and payable; yet the said defendant, though often requested, has not paid said sum of money, nor any part thereof.

Whereof the said plaintiff prays judgment against the said defendant for the said sum of $, together with interest thereon from the said . day of , A. D. 18 .

3. FOR GOOD WILL OF A BUSINESS.

(*Follow the last to* *, *then add:*) for certain good will of a certain trade and business of the said plaintiff, before then relinquished and given up by the said plaintiff to and in favor of the said defendant, and at his special instance and request, and which said sum of money the said plaintiff avers was then due and payable; yet the said defendant, etc. (*as in the last.*)

4. FOR GOOD WILL OF A PUBLIC HOUSE.

(*Follow* 2 *to* *, *then proceed:*) for the good will of a certain public house, commonly called or known by the name or sign of , and the trade and business of him, the said plaintiff, of a publican therein, before that time relinquished and given up by the said plaintiff to and in favor of the said defendant, and at his special instance and request, and which said sum of money the said plaintiff avers was then due and payable; yet the said defendant, etc. (*as in* 1.)

5. FOR FIXTURES LEFT ON A PLACE.

(*Follow* 2 *to* *, *then proceed:*) for so much money before that time and then due and payable from the said defendant to said plaintiff, for the relinquishing and giving up of certain buildings, erections, and improvements, before then made by the said plaintiff upon certain lands, by the said plaintiff before that time quitted and given up to and in favor of the said defendant, at his special instance and request, and which said sum of money the said plaintiff avers was then due and payable; yet the said defendant, etc. (*as in* 1.)

6. FOR USE AND OCCUPATION.

(*Follow* 2 *to* *, *then proceed:*) for the use and occupation of certain real estate, with the improvements thereon of the said plaintiff, by the said defendant and at his special instance and request, and by the sufferance and permission of the said plaintiff, for a long space of time before then elapsed, had, held, used, and occupied, and which said sum of money the plaintiff avers was then due and payable; and yet the said defendant, etc. (*as in* 1.)

NOTE.—It is unnecessary to state where the premises lie, or the term of the demise. The obligation to pay arises from the occupation with plaintiff's sufferance. 6 East, 248; 8 Term, 327; 16 East, 33; 2 B. & A. 119.

To authorize this general form of declaring, the facts must show expressly or impliedly that the defendant occupies as tenant of the

plaintiff; for if he occupies adversely to the plaintiff, there is no liability or contract to pay rent. The remedy is trespass or a suit to obtain possession. Butler *v.* Cowles, 4 Ohio, 205; Sinnard *v.* McBride, 3 Ib. 264.

As to rights of landlord and tenant in Ohio, *vide* Case *v.* Harte, 11 Ohio, 364; Foote *v.* Cincinnati, 11 Ib. 408; Boyd's Lessee *v.* Talbert, 12 Ib. 212; Bridgman *v.* Wells, 13 Ib. 443.

7. USE OF PASTURE, ETC.

(*Follow* 2 *to* *, *then proceed:*) for the use of certain pasture land of the said plaintiff, and the eatage of the grass thereon growing, by him, the said plaintiff, before that time let to the said defendant, at his special instance and request, and by the said defendant, according to such letting, had and used in and for the depasturing of cattle, horses, sheep, and other animals, for a long time before then elapsed, and which said sum of money the said plaintiff avers was then due and payable; yet the said defendant, etc. (*as in* 1.)

8. UNFURNISHED LODGINGS.

(*Follow* 2 *to* *, *then proceed:*) for the use and occupation of certain rooms and apartments of the said plaintiff, in and a parcel of a certain dwelling-house, by the said defendant, and at his special instance and request, and by the sufferance and permission of the said plaintiff, for a long space of time before then elapsed, and which said sum of money the said plaintiff avers was then due and payable; and yet the said defendant, etc. (*as in* 1.)

9. FURNISHED LODGINGS.

(*Follow* 2 *to* *, *then proceed:*) for the use and occupation of certain rooms and apartments of the said plaintiff, in and a parcel of a certain dwelling-house, by the said defendant, and at his special instance and request, and by the sufferance of the said plaintiff, for a long space of time before then elapsed, had, held, used, and occupied, together with certain household furniture, linen, and other necessaries, goods and chattels of the said plaintiff therein being, and which said sum of money the said plaintiff avers was then due and payable; and yet the said defendant, etc. (*as in* 1.)

NOTE.—The same form can easily be adapted for use of offices and rooms in other buildings.

10. FURNISHED LODGINGS WITH BOARD.

(*Follow* 2 *to* *, *then proceed:*) for the use and occupation of certain rooms, apartments, and furniture of the said plaintiff, before that time used and enjoyed by the said defendant, at his special instance and request, and by the permission of the said plaintiff, and for certain meat, drink, fire, candles, attendance, chattels, and other necessaries, by the said plaintiff before that time found and provided for the said defendant, at his special instance and request, and which said sum of money the said plaintiff avers was then due and payable; yet the said defendant, etc. (*as in* 1.)

11. FOR WAREHOUSING GOODS.

(*Follow* 2 *to* *, *then proceed:*) for warehouse room by the said plaintiff before that time found and provided, for the storing and keeping of certain goods and chattels before then stowed in certain warehouses and premises of the plaintiff, for the said defendant, and at his special instance and request, and which said sum of money the said plaintiff avers was then due and payable; and yet the said defendant, etc. (*as in* 1.)

12. FOR MOORAGE OF SHIPS.

(*Follow* 2 *to* *, *then proceed:*) for the mooring and fastening of a certain ship (or, steamboat, or, flat-boat, etc.) called the , to a certain wharf and landing of the said plaintiff, at , on the bank of the Ohio river, for a long space of time then elapsed, by the said defendant, at his special instance and request, and by the permission of the said plaintiff, and which said sum of money the said plaintiff avers was then due and payable; yet the said defendant, etc. (*as in* 1.)

13. FOR TOLLS FOR USE OF MARKET.

(*Follow* 2 *to* *, *then proceed:*) for divers reasonable tolls before that time and then due, and of right payable by and from the said defendant to the same plaintiff, as proprietor of a certain market, situate in the said town (or city), of which the said defendant incurred and became liable to pay to the said plaintiff, by reason of his, said defendant's, having occupied, with the permission of said plaintiff, a stall therein, and brought into the same and sold therein various goods and chattels of his, the said defendant, and which said sum of money the said plaintiff avers was then due and payable; yet the said defendant, etc. (*as in* 1.)

II. *Respecting Personal Property.*

14. FOR GOODS SOLD AND DELIVERED.

The said A B, plaintiff, complains of the said C D, defendant, for that the said defendant, on the day of , A. D. 18 , was indebted to the said plaintiff in the sum of $,* for divers goods, wares, merchandise, and chattels (or, when for live animals, horses, mares, geldings, bulls, cows, oxen, sheep, hogs, cattle, etc., *as the case may be*,) by the said plaintiff before that time sold and delivered to the said defendant, at his special instance and request, and which said sum of money the said plaintiff avers was then due and payable; and yet the said defendant, though often requested, has not paid said sum of money, nor any part thereof.

Wherefore the said plaintiff prays judgment against the said defendant for the said sum of $, together with interest thereon from the said day of , A. D. 18 .

15. FOR GOODS SOLD TO DEFENDANT, AND DELIVERED TO A THIRD PERSON.

(*Follow* 14 *to* *, *then proceed:*) for divers goods, wares, and merchandise (or horses, etc.,) by the said plaintiff, before that time bargained and sold to the said defendant, and under and by virtue of such bargain and sale delivered to one E F, at the special instance and request of the said defendant, and which said sum of money the plaintiff avers was then due and payable; and yet the said defendant, etc. (*as in* 14.)

16. FOR A CROP OF GRASS, ETC.

(*Follow* 14 *to* *, *then proceed:*) for a certain crop of grass (or, wheat, corn, turnips, potatoes, etc.,) of the said plaintiff, before that time bargained and sold by the said plaintiff to the said defendant, and at his special instance and request, and by the said defendant before that time accepted, cut down, and carried away (or, if turnips, potatoes, apples, etc., *gathered* for *cut down*,) and which said sum of money the said plaintiff avers was then due and payable; yet the said defendant, etc. (*as in* 14.)

17. FOR NECESSARIES FOR DEFENDANT.

(*Follow* 14 *to* *, *then proceed:*) for meat, drink, washing, lodging, and other necessaries, by the said plaintiff before that time found and provided for the said defendant, at his special instance and

request, and which said sum of money the said plaintiff avers was then due and payable; yet the said defendant, etc. (*as in* 14.)

18. FOR NECESSARIES FOR A THIRD PERSON.

(*Follow* 14 *to* *, *then proceed:*) for meat, drink, washing, lodging, and other necessaries, by the said plaintiff before that time found and provided, at the request of the said defendant, for one E F, (and divers other persons, *if more than one,*) and which said sum of money the said plaintiff avers was then due and payable; yet the said defendant, etc. (*as in* 14.)

19. FOR HORSE FEED AND STABLING.

(*Follow* 14 *to* *, *then proceed:*) for horse feed, stabling, care, and attendance, by the said plaintiff before that time found, and provided, and bestowed, for the feeding and keeping of divers horses, (*or, if cattle, describe them,*) of and for the said defendant, at his request, and which said sum of money the said plaintiff avers was then due and payable; yet the said defendant, etc. (*as in* 14.)

20. FOR PASTURING CATTLE, ETC.

(*Follow* 14 *to* *, *then proceed:*) for the agisting, depasturing, and feeding of divers cattle, (or, horses, sheep, etc.,) by the said plaintiff before that time agisted, depastured, and fed, in certain pastures and premises of the said plaintiff for the said defendant, at his request, and which said sum of money, the said plaintiff avers was then due and payable; yet the said defendant, etc. (*as in* 14.)

21. FOR HIRE OF GOODS, HORSES, SHIPS, ETC.

(*Follow* 14 *to* *, *then proceed:*) for the use and hire of divers horses, (or, oxen, cows, wagons, carriages, boats, skiffs, steamboats, vessels, furniture, plate, etc.,) goods and chattels, by the said plaintiff before that time let to hire and delivered to the said defendant, at his request, and by the said defendant, under said letting to hire, before then had and used, and which said sum of money the said plaintiff avers was then due and payable; yet the said defendant, etc. (*as in* 14.)

22. FOR COVERING MARES.

(*Follow* 14 *to* *, *then proceed:*) for the use of the stallion of the said plaintiff, before that time had and used, by the permission of the said plaintiff, in and for covering a certain mare, (or, certain

mares,) of and for the said defendant, and at his request, and which said sum of money the said plaintiff avers, was then due and payable; and yet the said defendant, etc. (*as in* 14.)

NOTE.—The above form will answer for putting defendant's cow to plaintiff's bull, by only substituting *bull* for *stallion*, and *cow* for *mare*.

23. FOR FREIGHT.

(*Follow* 14 *to* *, *then proceed:*) for certain freight before that time and then due and payable from the said defendant to the said plaintiff, for the carriage and conveyance of certain goods, wares, merchandise, and chattels, by the said plaintiff before that time carried and conveyed in and upon the vessel, (or, vessels, steamboats, etc.,) from divers ports and places to divers other ports and places, and there, at the latter places and ports, delivered by the said plaintiff, for the said defendant, at his request, and which said sum of money, the said plaintiff avers was then due and payable; yet the said defendant, etc. (*as in* 14.)

24. FOR PASSAGE ON BOARD SHIP, ETC.

(*Follow* 14 *to* *, *then proceed:*) For the passage of the said defendant (*or*, of divers seamen, boatmen, before then carried and conveyed by the said plaintiffs) in and on board of a certain ship or vessel, (or, steamboat, or, steamship,) whereof the said plaintiff was master and commander, from divers ports and places to divers other ports and places, and at the request of the said defendant, and which said sum of money the said plaintiff avers was then due and payable; yet the said defendant, etc. (*as in* 14.)

III. *Respecting Personal Services.*

25. FOR WAGES.

The said A B, plaintiff, complains of the said C D, defendant, for that the said defendant, on the day of , A. D. 18 , was indebted to said plaintiff in the sum of $,* for the wages or salary of the said plaintiff, before that time and then due and payable from the said defendant to the said plaintiff, for the services of the said plaintiff, by him before then performed, as the hired servant of and for the said defendant, and at his request, and which said sum of money the said plaintiff avers was then due and payable; yet the said defendant, though often requested, hath not paid said sum of money, nor any part thereof.

Wherefore the said plaintiff prays judgment against the said defendant for the said sum of $, together with interest thereon from the said day of , A. D. 18 .

26. FOR WAGES AS A SAILOR *v.* MASTER.

(*Follow* 25 *to* *, *then proceed:*) for the wages of the said plaintiff, before that time and then due and payable from the said defendant to the said plaintiff, for the service of the said plaintiff, before then performed, at the request of the said defendant, as a mariner of and belonging to a certain vessel or ship, (or, steamboat,) whereof the said defendant, during the time of such service was master and commander, and which said sum of money the said plaintiff avers was then due and payable; yet the said defendant, etc. (*as in* 25.)

27. FOR WAGES AS MASTER.

(*Follow* 25 *to* *, *then proceed:*) for the wages of the said plaintiff, due and owing for his service, before then performed by him, the said plaintiff, as master and commander of a certain ship or vessel, (or, steamboat,) for the said defendant, and at his request, and which said sum of money the said plaintiff avers was then due and payable; yet the said defendant, etc. (*as in* 25.)

28. FOR SERVICES AS ATTORNEY.

(*Follow* 25 *to* *, *then proceed:*) for the work, labor, care, diligence, and attendance of the said plaintiff, by the said plaintiff before that time performed and bestowed, as the attorney and solicitor of and for the said defendant, and upon his request, in and about prosecuting and defending certain actions, and performing other business as such attorney and solicitor for the said defendant at his like request; and also for his said plaintiff's services as attorney in drawing certain deeds, contracts, and other writings, and advice and counsel given by the said plaintiff, as such attorney to and for the said defendant and about his business, and at his like request, and which said sum of money the said plaintiff avers was then due and payable; yet the said defendant, etc. (*as in* 25.)

29. FOR SERVICES IN GENERAL.

(*Follow* 25 *to* *, *then proceed:*) for the work and labor, care and diligence of the said plaintiff, by the said plaintiff before that time performed and bestowed, about the business of the said defendant, and for the said defendant, and at his request; and also for divers materials, and other necessary things, by the said plaintiff, before

that time found and provided, in and about that work and labor for the said defendant, and at his like request, and which said sum of money the said plaintiff avers was then due and payable; yet the said defendant, etc. (*as in* 25.)

30. FOR WORK WITH HORSES, ETC.

(*Follow* 25 *to* *, *then proceed:*) for the work and labor, care, and diligence of the said plaintiff, before that time performed and bestowed, by the said plaintiff and his servants, and with horses, carts, and carriages, (or, lighters, boats, or other vessel,) goods and chattels, in and about the business of the said defendant, and for the said defendant, and at his request, and which said sum of money the said plaintiff avers was then due and payable; yet the said defendant, etc. (*as in* 25.)

31. FOR CARRIAGE OF GOODS BY LAND.

(*Follow* 25 *to* *, *then proceed:*) for the carriage and conveyance of divers goods, wares, merchandise, and chattels by the said plaintiff, before that time carried and conveyed, in certain carts, wagons, and other carriages, for the said defendant, and at his request, and which said sum of money the said plaintiff avers was then due and payable; yet the said defendant, etc. (*as in* 25.)

32. AS AGENT AND FOR COMMISSION.

(*Follow* 25 *to* *, *then proceed:*) for the work and labor, care, and diligence, and journeys of the said plaintiff, by the said plaintiff before that time performed and bestowed, as the agent of and for the said defendant, and on his retainer, and for a certain commission and reward due and payable from the said defendant to the said plaintiff, in respect thereof, and which said sum of money the said plaintiff avers was then due and payable; yet the said defendant, etc. (*as in* 25.)

33. AS A FACTOR.

(*Follow* 25 *to* *, *then proceed:*) for the work and labor, care and diligence, journeys and attendance of the said plaintiff, by him the said plaintiff before that time performed and bestowed, as the factor and agent of the said defendant, in and about the selling and disposing of divers goods, merchandise, and chattels, and in and about other business of the said defendant, and for the said defendant, and at his request, and which said sum of money the said plaintiff avers was then due and payable; yet the said defendant, etc. (*as in* 25.)

34. AS AN INSURANCE BROKER.

(*Follow* 25 *to* *, *then proceed:*) for the work and labor, care, and diligence of the said plaintiff, by him before that time performed and bestowed, in and about the writing, drawing, and making out of divers policies of insurance of divers ships, vessels, steamboats, goods, merchandise, and chattels, before that time written, drawn, and made out by the said plaintiff, as an insurance broker, and in and about the causing and procuring divers persons to insure divers sums of money upon the said ships, vessels, and steamboats, goods, merchandise, and chattels, at the request of the said defendant, and for divers sums of money before that time advanced and paid by the said plaintiff for the said defendant, at his like request, to divers persons, as and for premiums and rewards for the underwriting and subscribing the said policies of insurance of the said ships, vessels and steamboats, goods, merchandise, and chattels, during the voyages undertaken by said ships, vessels, and steamboats, and for the trouble, care, and diligence of the said plaintiff in that behalf, at the like request of the said defendant, and which said sum of money the said plaintiff avers was then due and payable; yet the said defendant, etc. (*as in* 25.)

35. AS AN AUCTIONEER.

(*Follow* 25 *to* *, *then proceed:*) for the work and labor, care, diligence, and attention of the said plaintiff, by the said plaintiff before that time performed and bestowed, as an auctioneer and appraiser, in and about the selling and disposing of, and endeavoring to sell and dispose of, by auction and otherwise, divers goods, chattels, and effects, for the said defendant, and at his request, and in and about the appraising and valuing of divers other goods, chattels, and effects, for the said defendant, at his like request, and which said sum of money the said plaintiff avers was then due and payable; yet the said defendant, etc. (*as in* 25.)

36. FOR SERVICES AS SCHOOLMASTER; FOR BOOKS, ETC.

(*Follow* 25 *to* *, *then proceed:*) for the work and labor, care, diligence, and attendance of the said plaintiff, by him, the said plaintiff, and his servants and teachers, before that time performed and bestowed for the said defendant, as a schoolmaster, in and about the teaching and instructing the children of the said defendant in the various branches of education, at the request of the said defendant, and for divers books, pens, paper, chattels, and other necessary things, by the said plaintiff before that time found and pro-

vided for, and used by, the said children of the said defendant about that work and labor for the said defendant, and at his like request; and also for meat, drink, washing, lodging, attendance, and other necessaries, by the said plaintiff before that time found and provided for the said children of the said defendant, and at his like request, and which said sum of money the said plaintiff avers was then due and payable; yet the said defendant, etc. (*as in* 25.)

37. AS SURGEON AND PHYSICIAN.

(*Follow* 25 *to* *, *then proceed:*) for the work and labor, care, diligence, journeys, and attendance of the said plaintiff, by the said plaintiff, before that time performed and bestowed, as a surgeon for the said defendant, and at his request, in and about the healing, and curing of the said defendant, and of other persons, of various maladies and diseases under which the said persons respectively labored, and for divers medicines and other chattels before that time found and provided, administered, and delivered in that behalf, by the said plaintiff, for the said defendant, and at his like request, and which said sum of money the said plaintiff avers was then due and payable; yet the said defendant, etc. (*as in* 25.)

38. AS AN UNDERTAKER OF FUNERALS.

(*Follow* 25 *to* *, *then proceed:*) for the work and labor, care, diligence, and attendance of the said plaintiff, as an undertaker of funerals, before that time performed and bestowed by the said plaintiff and his servants in and about the funeral of one E F, (or, a certain person deceased,) on the retainer and at the request of the said defendant, and for the hearse, horses, carriages, and other chattels, used and applied in and about the furnishing and conducting of the said funeral, by the said plaintiff before that time found and provided for the said defendant, at his like request, and which said sum of money the said plaintiff avers was then due and payable; yet the said defendant, etc. (*as in* 25.)

IV. *Respecting Moneys.*

39. FOR MONEY LENT.

The said A B, plaintiff, complains of the said C D, defendant, for that the said defendant on the day of , A. D. 18 , was indebted to the said plaintiff in the sum of $,* for so much money, before that time by the said plaintiff lent and advanced to the said defendant, at his request, and which said sum of money the said

plaintiff avers was then due and payable; yet the said defendant, though often requested, has not paid said sum of money, nor any part thereof.

Wherefore the said plaintiff prays judgment against the said defendant for the said sum of $, together with interest thereon from the said day of , A. D. 18 .

40. FOR MONEY PAID.

(*Follow* 39 *to* *, *then proceed:*) for so much money, by the said plaintiff before that time paid, laid out, and expended, to and for the use of the said defendant, at his request, and which said sum of money the said plaintiff avers was then due and payable; yet the said defendant, etc. (*as in* 39.)

41. FOR MONEY HAD AND RECEIVED.

(*Follow* 39 *to* *, *then proceed:*) for so much money, by said defendant before that time had and received, to and for the use of the said plaintiff, and which said sum of money the said plaintiff avers was then due and payable; yet the said defendant, etc. (*as in* 39.)

42. FOR INTEREST.

(*Follow* 39 *to* *, *then proceed:*) for so much money, before that time and then due and payable from the said defendant to the said plaintiff, for interest upon and for the forbearance of divers large sums of money before that time due, and owing from the said defendant to the said plaintiff, and by the said plaintiff forborne for a long space of time before they elapsed, at the request of the said defendant, and which said sum of money the said plaintiff avers was then due and payable; yet the said defendant, etc. (*as in* 39.)

43. ON AN ACCOUNT STATED.

(*Follow* 39 *to* *, *then proceed:*) on an account before that time stated, between the said plaintiff and the said defendant, touching divers moneys, goods, dealings, and sales between said parties, and which said sum of money the said plaintiff avers was then due and payable; yet the said defendant, etc. (*as in* 39.)

V. *Relating to the Character in which Persons sue or are sued.*

44. SURVIVING PARTNER.

The said A B, survivor of E F, plaintiff, complains of C D, survivor of G H, defendant, for that the said C D and G H, in his

lifetime, were partners, doing business under the name of C D & Co., and as such partners were, on the day of , A. D. 18 , indebted to the said A B and E F, in his lifetime partners, doing business under the name of A B & Co., in the sum of $, (*here set out the cause of action as in former counts, and conclude as follows:*) yet neither the said G H in his lifetime, nor the said defendant, at any time, though often requested, has paid said sum of money, or any part thereof, either to the said plaintiff, or to the said E F, in his lifetime.

Wherefore the said plaintiff prays judgment against the said defendant for the said sum of $, together with interest thereon from the said day of , A. D. 18 .

45. HUSBAND AND WIFE FOR WORK, ETC., OF WIFE BEFORE MARRIAGE.

The said A B and E F his wife, plaintiffs, complain of C D, defendant, for that the said defendant, whilst the said E F was sole and unmarried, on the day of , A. D. 18 , was indebted to the said E F for, etc. (*as before given*); yet the said defendant, though often requested, hath not paid the said sum of money, or any part thereof, to the said plaintiffs, or to either of them.

Wherefore the said plaintiffs pray judgment against the said defendant for the said sum of $, with interest thereon from the day of , A. D. 18 .

46. AGAINST HUSBAND AND WIFE, FOR DEBTS OF WIFE WHILE SOLE.

The said A B, plaintiff, complains of the said C D and E his wife, for that the said E, whilst she was sole and unmarried, on the day of , A. D. 18 , was indebted to the said plaintiff in the sum of $, etc. (*set out cause of action according to its nature*); yet the said E, while so sole and unmarried, and the said defendants, since their intermarriage, have not, nor hath either of them, as yet paid said sum of money, (or, several sums, *if more than one,*) or any part thereof, to the said plaintiff, though often requested so to do.

Wherefore the said plaintiff prays judgment against the said defendants, etc.

47. BY EXECUTORS AND ADMINISTRATORS.

The said A B, executor of the last will and testament of E F, deceased, plaintiff, complains of the said C D, defendant, for that the said C D heretofore, in the lifetime of the said E F, to wit, on the day of , A. D. 18 , was indebted to the said E F in

the sum of $, etc. (*here state cause of action*); yet the said defendant hath not paid said sum of money, or any part thereof, (or, *if more than one*, the said several sums of money, or any or either of them, or any part thereof,) to the said E F in his lifetime, or to the said plaintiff since the death of the said E F, although often requested so to do.

Wherefore the said plaintiff, as such executor, prays judgment against said defendant, etc.

¶ All profert is done away with by the code; and hence no necessity of making profert of letters testamentary. Indeed, in practice under the old system, a formal profert was seldom inserted in the declaration. It is in issue by the averments of the petition, and can be denied; which would compel plaintiff to show his letters. The same is also true of administrators. This form can be easily adapted for an administrator.

48. AGAINST EXECUTORS OR ADMINISTRATORS.

The said A B, plaintiff, complains of the said C D, executor of the last will and testament of E F, deceased, (or, administrator of the estate of E F, deceased.) defendant, for that the said E F, in his lifetime, to wit, on the day of , A. D. 18 , was indebted to the said plaintiff in the sum of $, etc. (*as before given*); yet the said E F, in his lifetime, and the said defendant, as executor as aforesaid, (or, administrator as aforesaid,) since the death of the said E F, have not, nor hath either of them, as yet paid the said sum (or, said several sums) of money, or any part thereof, to the said plaintiff, although often requested so to do.

Wherefore the said plaintiff prays judgment against the said defendant, as such executor, (or, administrator,) for the said sum of $, together with interest thereon from the said day of , A. D. 18 , to be levied and paid out of the estate of the said E F, in the hands of the said defendant to be administered.

The said A B, plaintiff, complains of the said C D, executor of the last will and testament of E F, deceased, (or, administrator of the estate of E F, deceased,) defendant, for that the said E F was, in his lifetime, to wit, on the day of , A. D. 18 , indebted to the said plaintiff in the sum of $ (*here state the particular common count applicable to the cause of action*); yet the said E F, though often requested so to do, did not in his lifetime pay said

sum of money, nor any part thereof; and the plaintiff saith that after the appointment and qualification of the said C D as such executor (or, administrator) as aforesaid, and before the commencement of this action, he presented said claim to the said C D, and requested said C D to allow the same as a valid claim against said estate; but that said defendant absolutely refused to allow said claim against said estate, and rejected the same as such, and has hitherto and still does refuse to allow and pay the same; nor has the same been paid by said E F in his lifetime, nor has said C D paid the same or any part thereof.

Wherefore said plaintiff prays judgment against said C D as such executor (or, administrator) for said sum of $, together with interest thereon from the day of , A. D. 18 , to be levied and paid out of the estate of said E F, in the hands of said defendant to be administered.

S N, Att'y for Plaintiff.

These three forms will answer in all cases. The two first forms will answer when the law allows a suit, but prohibits the recovery of costs. But in Ohio the statute declares that no suit shall be brought unless the claim has been presented to the representative, and by him rejected. He has a right to insist upon the affidavit of the creditor, provided for in the statute, before deciding whether he will allow or reject. But if the claim is present without a verification, and no objection is interposed on that account by the representative, but he rejects and refuses to allow the claim, he waives the verification, and a suit may be brought. Under the Ohio statute, it is therefore necessary to aver this presentation and rejection of the claim, or the petition will be bad.

SPECIAL COUNTS.

I. *On Promissory Notes.*

49. PAYEE *v.* MAKER.*

The said A B, plaintiff, complains of the said C D, defendant, for that the said defendant, on the day of , A. D. 18 , at (*place where dated,*) made his certain promissory note in writing of that date, and then and there delivered the same to the said plaintiff, and thereby promised to pay to the said plaintiff or order, (*if not payable to order, leave the words "or order" out,*) in days

* See section 117, page 258.

(in one year, or, two years, or, months,) from the date thereof, the sum of $, with interest thereon, (at the rate of per cent., *if there is a special rate stated in the note,*) which period has since elapsed; yet the said defendant hath not paid said sum of money, nor any part thereof, to the said plaintiff, although often requested so to do.

Wherefore the said plaintiff prays judgment against the said defendant for the said sum of $, together with interest thereon, (at the rate of per cent., *if any special rate is stated in the note,*) from the day of , A. D. 18 .

50. ON NOTE MADE BY A FIRM.

The said A B, plaintiff, complains of the said C D and E F, doing business under the name of D & E, defendants, for that the said defendants, on the day of , A. D. 18 , at (*place of date,*) made their certain promissory note in writing of that date, and then and there delivered the same to the said plaintiff, and thereby, by the said name of D & E, promised to pay to the said plaintiff, or order, the sum of $, in days from the date thereof, which period has since elapsed; yet the said defendants have not, nor hath either of them, paid said sum of money, or any part thereof, to the said plaintiff.

Wherefore the said plaintiff prays, etc. (*as in* 49.)

NOTE.—Since these petitions have to be sworn to, the amount actually due must be set forth in the petition, and the prayer must state from what point of time interest is to be calculated. Hence the petition must not ask for what is due at the time of filing it, with interest from that date, but for what is due at the point of time from which interest would be calculated on rendering judgment. Hence, if the last payment was made some time before the bringing of the action, interest will be calculated from that date; otherwise the petition would compound the interest. Where partial payments have been made, but not enough to pay all the interest due, then these payments are applied by law to the earliest interest, and the demand for interest will be from the time up to which the payments satisfy the interest. In such a case, the averment may still be as in the above forms, but the prayer for interest will not date from the time when the note shows it to be due, but from the time up to which it has been paid.

Where, however, there have been payments exceeding the interest and [illegible] part of the principal, the petition may

be varied in the averment of the breach. The following form will answer. There is probably no need of this form, so the prayer, as to the amount of debt due and interest, be correctly stated. The prayer for judgment fixes the amount of the recovery.

51. ON A NOTE PARTLY PAID.

(*Follow* 49 *to the breach, then proceed:*) and the said plaintiff saith that there was due and unpaid on said promissory note on the day of , A. D. 18 , the sum of $, which last-named sum the said defendant has not paid, nor any part thereof.

Wherefore the said plaintiff prays judgment against the said defendant for the said last-named sum of $, together with interest thereon from the said day of , A. D. 18 .

¶ The time from which interest should be claimed is the day from which the sum demanded draws interest in law, and that will be determined by the law regulating the calculation of interest.

The rule in Massachusetts is thus stated: "The rule is, to compute the interest on the principal sum from the time when interest commenced to the first time when a payment was made, which exceeds, either alone or with previous payments, if any, the interest at that due; add the interest to the principal, and from this sum deduct the payment made at that time, together with previous payments, if any, and the remainder will constitute a new principal, on which compute interest and deduct payments as upon the first principal, and proceed in this manner up to the time when the last payment was made exceeding the interest due at that date." Dean *v.* Williams, 17 Mass. 417; Fay *v.* Bradley, 1 Pick. 194. This rule has been adopted in Ohio practice. Hammer *v.* Neville et al., Wright, 169.

Where a note or money is payable on demand, interest is to be computed from the service of the writ or commencement of the suit, Hunt *v.* Nevers, 15 Pick. 500; Brewer *v.* Tyringham, 12 Ib. 547; McLure *v.* Longworth, Wright, 582; unless a previous demand is proved. Patrick *v.* Clay, 4 Bibb, 246; 2 Ib. 467; 2 Bailey, 276.

A note, however, which simply promises to pay a certain sum, without specifying whether on demand or on time, is due at once, and carries interest from date. As: Due A B so much;—such a note carries interest from date. Francis *v.* Castleman, 4 Bibb, 282; Cannon *v.* Biggs, 1 McCord, 370.

The rate of interest is to be determined by the law of the place

where the contract is to be executed. Archer *v.* Dunn, 2 Watts & Serg. 327; Sweet *v.* Dodge, 4 Smedes & Marsh. 667; Healy *v.* Gorman, 3 Green, (N. J.) 328. Where no place of payment is stated in the note, interest is to be calculated according to the law of the place where the note was made; and the date is *prima facie* evidence of its being made at the place where dated. Hoppins *v.* Miller, 2 Haw. 185. In the absence of proof of what is the legal rate of interest in the place where a note was made, the plaintiff is entitled to the rate fixed by the law of the forum. Wood *v.* Corl, 4 Met. 203.

Where a note is payable on demand, in order to recover interest prior to the commencement of the suit, it is necessary to aver a demand and the precise time of it.

There are cases which present a different question. Where the law allows parties to contract for a greater or less rate of interest than that fixed by law, what rate will a note bear after due, where it is payable at a day certain, with interest at a greater or less rate than that fixed by law? This question came up in the case of Brewster *v.* Wakefield, 22 How. U. S. 118. The note in that case contained a promise to pay a certain sum, to the order of Wakefield, twelve months after the date thereof, with interest thereon at the rate of twenty-five per cent. per annum from the date thereof. Taney, C. J.: "The written stipulation as to interest is interest from the date to the day specified for the payment. There is no stipulation in regard to interest after the notes become due, in case the debtor should fail to pay them; and if the right to interest depended altogether on the contract, and was not given by law, in a case of this kind, the appellee would be entitled to no interest whatever after the day of payment. The contract being entirely silent as to interest, if the notes should not be punctually paid, the creditor is entitled to interest after that time by *operation of law*, and not by any *provision* in the contract. And in this view of the subject, we think the territorial courts committed an error in allowing, after the notes fell due, a higher rate of interest than that established by law, where there was no contract to regulate it. The cases of Macomber *v.* Dunham, 8 Wend. 550; United States Bank *v.* Chapin, 9 Ib. 471; and Ludwick *v.* Huntsinger, 5 Watts & Serg. 51, 60, were decided upon this principle, and, in the opinion of the court, correctly decided." This decision was made under a law, which enacted that "any rate of interest agreed upon by the parties in the contract, specifying the same in writing, shall be legal and valid." This is like the Ohio statute in this respect.

In Ludwick *v.* Huntsinger, 5 Watts & Serg. 51, it was held that a note payable at a future day, with three per cent. interest from date, carries that interest till the day of payment, and, after that, carries lawful interest. In the United States Bank *v.* Chapin, 9 Wend. 471, it was held that where a bank was allowed to charge but six per cent. on discounts, its notes, after they became due, and were not paid, carried seven per cent. interest, that being the interest fixed by the law of New York on a failure to pay money when due. These two cases clearly settle the rule, that where a note is given, payable at a day certain, with a rate of interest stated therein, such note, after it becomes due, carries not the interest named in the note, but the interest fixed by law.

The same ruling was made in the case of Robinson *v.* Kinney, 2 Kan. 184. The note there was in the following form: "On the 1st day of November next, for value received, we promise to pay Mrs. Lois Kinney or bearer $300, with interest at the rate of three per cent. per month." The court held that, after it became due, it carried only the interest fixed by law—to wit, six per cent. The statute of Kansas, say the court, is precisely the same as that of Minnesota; and the court followed the decision in Brewster *v.* Wakefield, *supra*. The same decision was made by Judge Guthrie in the Gallia Common Pleas, in 1872. It is clear that there is here no written agreement for interest after the note is due; and where the interest stated in the note is less than legal interest, it becomes apparent that, by neglect to pay, the party should not keep the money at the low rate of interest named. But the rule is one which must be applied in the one case as in the other.

52. ON A NOTE PAYABLE ON DEMAND, WHEN DEMAND HAS BEEN MADE.

The said A B, plaintiff, complains of the said C D, defendant, for that the said defendant, on the day of , A. D. 18 , at (*place of date*,) made his certain promissory note in writing of that date, and then and there delivered the same to the said plaintiff, and thereby promised to pay to the said plaintiff (or order, *as the note is*,) the sum of $, on demand; and the said plaintiff saith that afterward, on the day of , A. D. 18 , he, the said plaintiff, did request the said defendant to pay to him, the said plaintiff, the said sum of $, in said note mentioned; yet the said defendant did not, nor has he since paid said sum of money, or any part thereof.

Wherefore the said plaintiff prays judgment against the said de-

fendant for the said sum of $, together with interest thereon from the said day of , A. D. 18 , (*time of demand.*)

NOTE.—Where the exact time can not be stated, the averment may be that on or before a certain day the demand was made, and then interest will commence at the day named.

53. ON A NOTE MADE IN ANOTHER STATE, TO RECOVER THE INTEREST OF THAT STATE.

The said A B, plaintiff, complains of C D, defendant, for that the said defendant, on the day of , A. D. 18 , at , in the State of New York, made his certain promissory note in writing of that date, and then and there delivered the same to the said plaintiff, and thereby promised to pay to the said plaintiff, or order, the sum of $, with interest thereon, in days from the date thereof, which period has since elapsed; and the said plaintiff avers that, by the law of the said State of New York, he, the said plaintiff, is entitled to recover interest on the said sum at the rate of seven per cent. per annum; yet the said defendant did not pay said sum of money when due, nor any part thereof, nor hath he, since the same became due, paid the same, with interest thereon, at the said rate of seven per cent., or any part thereof.

Wherefore the said plaintiff prays judgment against the said defendant for the said sum of $, together with interest thereon, at the said rate of seven per cent. from the said day of , A. D. 18 .

NOTE.—The advantage of this form of declaring is that, in case of a default, no evidence of the rate of interest would be required, nor in any case, unless denied by the defendant. It is often difficult to prove the rate of interest abroad. This mode of declaring will avoid the difficulty, except where there is a dispute as to what the rate is, which seldom happens. Under the code, it is indeed doubtful whether any interest but that of the forum can be recovered, unless the petition sets out all the facts which show the right to recover it.

54. ON A NOTE HAVING A WRONG DATE.

The said A B, plaintiff, complains of the said C D, defendant, for that the said defendant, on the day of , A. D. 18 , (*this should be the true date of the making,*) at , (*place named in note, if one,*) made his certain promissory note in writing, bearing date by mistake the day of , A. D. 18 , when the said

promissory note was, at the time of the making thereof, meant and understood by the said defendant and plaintiff to be dated on the day of , A. D. 18 , and thereby promised to pay the said plaintiff, or order, days after the date thereof, that is to say, days after the said day of , A. D. 18 , when the said promissory note was so made and understood to be made, the sum of $, and then and there delivered the same to the said plaintiff; yet the said defendant, etc. (*concluding as in previous forms, demanding interest from the true date.*)

55. ON A NOTE PAYABLE AT A PARTICULAR PLACE.

The said A B, plaintiff, complains of the said C D, defendant, for that the said defendant, on the day of , A. D. 18 , at (*place of date,*) made his certain promissory note in writing, of that date, and then and there delivered the same to the said plaintiff, and thereby promised to pay the said plaintiff, at the banking-house of , in the city of , the sum of $, in days after the date thereof, which period has since elapsed; yet the said defendant did not, at the time when said note became due, pay the same for the said plaintiff, at the banking-house of the said , in said city of , nor hath the said defendant since paid the said sum, or any part thereof.

Wherefore he prays, etc.

¶ No demand is necessary at the place on such a note; nor is it necessary to aver one in a suit *v.* maker. Conn *v.* Gano, 1 Ohio, 483. Where, however, the maker is ready at the place with the money, it is a tender, and may be pleaded as such. Otis *v.* Barton, 10 N. Hamp. 433; Bond *v.* Storrs, 13 Conn. 412. Where indorsers are sought to be held, a demand at the place is necessary.

56. ON A NOTE PAYABLE IN INSTALLMENTS, WHERE A FAILURE TO PAY ONE INSTALLMENT MAKES ALL SUBSEQUENT ONES DUE.

The said A B, plaintiff, complains of the said C D, defendant, for that the said defendant, on the day of , A. D. 18 , at (*place of date, if one; if no date, no place need be stated,*) made his certain promissory note in writing of that date, and then and there delivered the same to the said plaintiff, and thereby promised to pay to the said plaintiff, or order, the sum of $, in manner following: $ in one year from date, $ in two years from date, and $ in three years from date; and that, in case default should be made in either of said payments, then the whole of said sum of

$ should become payable; and the said plaintiff saith that afterward, on the day of , A. D. 18 , ensuing the date thereof, the first of said installments became due and payable, and yet the said defendant did not pay the said sum of $, on the day of , A. D. 18 , whereby he became liable to pay the whole of said sum of $; yet the said defendant hath not paid said several sums of money, or either of them, or any part thereof.

Wherefore the said plaintiff prays judgment against the said defendant for the said sum of $, together with interest thereon from the said day of , A. D. 18 .

NOTE.—If suit is not brought till all the installments are due, no notice need be taken of the forfeiture. The petition may simply set forth the making of the note and the non-payment of the said several installments.

57. INDORSEE *v.* MAKER.

The said A B, plaintiff, complains of the said C D, defendant, for that the said defendant, on the day of , A. D. 18 , at (*place of date, if any,*) made his certain promissory note in writing of that date, and then and there delivered the same to one E F, and thereby promised to pay to the said E F, or order, the sum of $, in from the date thereof; and the said E F did then and there indorse and deliver said promissory note to the said plaintiff, (or, *if a second or third indorsee*, did then and there indorse and deliver the same to one G H, and the said G H did afterward then and there indorse and deliver the same to one H I, and the said H I did afterward then and there indorse and deliver the same to the said plaintiff,) yet the said defendant hath not paid said sum of money, nor any part thereof, to the said E F before said indorsement, or to the said plaintiff since said indorsement.

Wherefore he prays judgment against the said defendant for the said sum of $, together with interest thereon from the said day of , A. D. 18 .

NOTE.—Where the dates of the indorsements are known, it may be well enough to state them, as these will show whether indorsed before or after due.

58. STATEMENT OF AN INDORSEMENT BY AN ADMINISTRATOR.

(*State the note as in the last form, then add:*) and that the said E F, afterward, on the day of , A. D. 18 , departed this life, and one G H, was on the day of , A. D. 18 , by the Probate Court of the county of , duly appointed administrator of the estate of the said E F, deceased, and the said G H afterward, to wit, on the day of , A. D. 18 , as such administrator, indorsed and delivered the said promissory note to the said plaintiff, (*or to any other indorsee.*)

(*The balance of the petition will be as in* 57.)

59. ON A NOTE PAYABLE TO BEARER.

The said A B, plaintiff, complains of the said C D, defendant, for that the said defendant, on the day of , A. D. 18 , at (*place of date, if it has any,*) made his certain promissory note in writing of that date, and then and there delivered the same to one E F, and thereby promised to pay to the said E F, or bearer, the sum of $, in days from the date thereof, and the said E F then and there, for a valuable consideration, delivered the said promissory note to the said plaintiff, whereby the said plaintiff then and there became the lawful holder of the said promissory note, and entitled to demand the money due thereon of the said defendant; yet the said defendant did not pay said sum of money to the said E F, while he was the lawful holder of the said promissory note, nor hath he paid the same to the said plaintiff since he so became entitled to receive the sum due thereon.

Wherefore he prays judgment against the said defendant, for the said sum of $, together with interest thereon from the said day of , A. D. 18 .

60. INDORSEE *v.* INDORSER.

The said A B, plaintiff, complains of the said C D, defendant, for that one E F, on the day of , A. D. 18 , at (*place of date,*) made his certain promissory note in writing of that date, and then and there delivered the same to the said defendant, and thereby promised to pay to the said defendant, or order, the sum of $, in days after the date thereof; and the said defendant did afterward then and there indorse and deliver the said promissory note to the said plaintiff, (*or, if last indorser, state indorsement to one G H, and then aver indorsement by him to plaintiff as in* 57;)

and the said plaintiff further saith that afterward, to wit, on the day of , A. D. 18 , when said note became due, the said promissory note was duly presented to the said E F, and payment thereof duly required, according to the tenor and effect of said promissory note, and the said E F then and there refused to pay the said sum of money; of all which the said defendant afterward, on the day and year last aforesaid, had due and legal notice; yet neither the said defendant, nor the said E F, has paid said sum of money, or any part thereof, to the said plaintiff. Wherefore he prays judgment, etc.

61. AN AVERMENT OF WANT OF FUNDS TO EXCUSE A NOTICE OF NON-PAYMENT.

(*Proceed as in the last up to the end of the averment of a demand, and in lieu of the averment of notice insert:*) and the said plaintiff saith that, at the time of making said promissory note as aforesaid, and from thence until, and at the time when, the same was presented to the said E F for payment thereof, the said E F had not in his hands any effects of the said defendant, nor had the said E F received any consideration from the said defendant for the making or payment of the said promissory note; but, on the contrary, the said E F made said promissory note for the accommodation and at the request of the said defendant, and the said defendant has not sustained any damage for the want of a notice of the non-payment by said E F of the sum of money in the said promissory note stated; yet the said defendant, etc. (*as in* 60.)

62. AN AVERMENT THAT THE MAKER COULD NOT BE FOUND.

(*Proceed as in* 60 *to the close of the averment of indorsement, then add:*) and the said plaintiff saith that afterward, when the said promissory note became due and payable, to wit, on the day of , A. D. 18 , (*the day it became due,*) diligent search and inquiry was made after the said E F, at , aforesaid, (*the place where the note is payable; and this is the place of its date, if no other place is specified in the same.*) and elsewhere, in order that the said promissory note might be presented to the said E F for payment thereof, but the said E F could not on such search and inquiry be found, nor did the said E F then, or at any time before or since, pay or cause to be paid the said sum of money, in said promissory note specified, or any part thereof, but hath wholly failed so to do; of all which the said defendant afterward had

notice; yet the said defendant hath not paid said sum of money, nor any part thereof, to the said plaintiff.

Wherefore he prays judgment, etc.

63. SURVIVING PAYEE *v.* MAKER.

The said A B, plaintiff, complains of the said C D, defendant, for that the said defendant, on the day of , A. D. 18 ; at (*place of date,*) made his certain promissory note in writing of that date, and then and there delivered the same to the said plaintiff and one E F, he, the said E F, then being in full life, and thereby promised to pay to the said plaintiff and the said E F, then in full life, or their order, the sum of $, in days after the date thereof, and the said plaintiff avers that the said E F has, since the making of said promissory note, and before the commencement of this action, departed this life, leaving the said plaintiff his survivor; yet the said defendant has not paid said sum of money, nor any part thereof, to the said E F in his lifetime, or to the said plaintiff.

Wherefore the said plaintiff prays judgment against the said defendant for the said sum of $, together with interest thereon from the said day of , A. D. 18 .

64. PAYEE *v.* SURVIVING MAKER.

The said A B, plaintiff, complains of the said C D, defendant, for that the said defendant and one E F, who has since deceased, on the day of , A. D. 18 , at (*place of date,*) made their certain promissory note in writing of that date, and then and there delivered the same to the said plaintiff, and thereby promised to pay the said plaintiff, or order, the sum of $, in days after the date thereof; and the said plaintiff avers that the said E F, after the making of said promissory note, and before the commencement of this action, departed this life, leaving the said defendant surviving him; yet the said E F did not in his lifetime pay said sum, nor hath the said defendant paid said sum of money, nor any part thereof, to the said plaintiff.

Wherefore he prays judgment against the said defendant for the said sum of $, together with interest thereon from the day of , A. D. 18 .

65. HUSBAND AND WIFE ON NOTE PAYABLE TO HER WHILE SOLE.

The said A B, and E his wife, plaintiffs, complain of the said C D, defendant, for that the said C D, on the day of , A. D. 18 , at (*place of date,*) made his certain promissory note in writing of that date, and then and there delivered the same to the said E, then being sole, but now the wife of the said A B, and thereby promised to pay to the said E, by her then name of E F, or order, the sum of $, in after the date thereof; yet the said defendant has not paid said sum of money to the said plaintiffs, or either of them, nor any part thereof.

Wherefore the said plaintiffs pray judgment, etc.

66. BY HUSBAND ON NOTE GIVEN THE WIFE DURING COVERTURE.

The said A B, plaintiff, complains of the said C D, defendant, for that the said defendant, on the day of , A. D. 18 , at (*place of date,*) made his certain promissory note in writing of that date, and then and there delivered the same to E, then and there and still being the wife of the said plaintiff, and for the use and benefit of the said plaintiff, and thereby promised to pay to the said E, so being the wife of said plaintiff, or order, the sum of $, in after the date thereof, which period has now elapsed; yet the said defendant hath not paid said sum of money, or any part thereof, to the said E or to the said plaintiff.

Wherefore the said plaintiff prays judgment against the said defendant for the said sum of $, together with interest thereon from the day of , A. D. 18 .

67. AGAINST HUSBAND AND WIFE ON NOTE BY WIFE WHILE SOLE.

The said A B, plaintiff, complains of the said C D and E, his wife, for that the said E heretofore, whilst she was sole and unmarried, on the day of , A. D. 18 , at (*place of date,*) made her certain promissory note in writing of that date, and then and there delivered the same to the said plaintiff, and thereby promised, by her then name of E F, to pay to the said plaintiff, or order, the sum of $, in after the date thereof; and the said E F has since intermarried with the said C D; yet the said defendants have not, nor hath either of them, paid the said sum of money, or any part thereof, to the said plaintiff.

Wherefore the said plaintiff prays judgment against the said defendants for the said sum of $, together with interest thereon from the day of , A. D. 18 .

68. EXECUTOR OR ADMINISTRATOR OF PAYEE *v.* MAKER.

The said A B, executor (or, administrator,) of E F, deceased, complains of the said C D, defendant, for that the said C D, in the lifetime of the said E F, on the day of , A. D. 18 , at (*place of date,*) made his certain promissory note in writing of that date and then and there delivered the same to the said E F, then being in full life, and thereby promised to pay to the said E F, or order, the sum of $, in after the date thereof; and the plaintiff says that the said E F hath, since the making of said promissory note and before the commencement of this action, departed this life, and the said plaintiff hath been duly appointed executor (or, administrator,) of the estate of the said E F; of all which the said defendant had notice; yet the said defendant did not pay said sum of money to the said E F in his lifetime, nor hath he paid the same to the said plaintiff since the decease of the said E F.

Wherefore the said plaintiff prays judgment against the said defendant for the said sum of $, together with interest thereon from day of , A. D. 18 .

69. PAYEE *v.* EXECUTOR OR ADMINISTRATOR OF MAKER.

The said A B, plaintiff, complains of the said C D, executor of the last will and testament (or, administrator of the estate,) of the said E F, defendant, for that the said E F, in his lifetime, on the day of , A. D. 18 , at (*place of date,*) made his certain promissory note in writing, and then and there delivered the same to the said plaintiff, and thereby promised to pay to the said plaintiff, or order, the sum of $, in after the date thereof, which period has since elapsed; and the said plaintiff saith that, after the making of said promissory note and before the commencement of this action, the said E E departed this life testate, and that the said defendant was duly appointed executor (or, administrator,) of the estate of the said E F; and the said plaintiff further saith that after the qualification of said C D as such executor, (or, after the appointment and qualification of the said C D as such administrator, to wit, on the day of A. D. 18 , and before the commencement of this suit, the said plaintiff presented said claims to the said C D as such executor, (or, administrator,) and requested him to allow the same as a valid claim against said estate, but the said defendant refused to allow the same as a claim against said estate, and wholly rejected the same; yet the said E F did not in his lifetime pay, nor hath the said plaintiff since his

decease, paid said sum of money, or any part thereof, to the said plaintiff.

Wherefore the said plaintiff prays judgment against the said defendant, as such executor, (or, administrator,) for the said sum of $, together with interest thereon from the day of , A. D. 18 , to be levied and paid out of the estate of the said E F, in the hands of the said defendant to be administered.

The above averment of presentation and rejection is a necessary averment under the law of Ohio and of other States, which have the same provision. The statute of Ohio declares that no action shall be brought against a personal representative until the claim has been presented and rejected. If the statute, as formerly was the case in Ohio, only provided that costs should not be recovered, if suit was brought before a certain time, then no such averment is necessary. Costs are recoverable on a recovery on a rejected claim.

II.—*On Bankers' Checks.*

70. HOLDER *v.* DRAWER.

The said A B, plaintiff, complains of C D, defendant, for that the said defendant, on the day of , A. D. 18 , at (*place of date,*) made his certain draft or order in writing of that date, and then and there directed the said draft or order to , of , and thereby then and there required the said to pay to the said plaintiff, or bearer, the sum of $, and then and there delivered the said draft or order to the said plaintiff; and the said plaintiff avers that, after the making of the said draft or order, and before any payment of the said sum of money therein specified, the said draft or order was presented on the day of , A. D. 18 , to the said , for payment thereof, and he was then and there requested to pay the said sum, according to the tenor and effect thereof; but the said did not, nor would at the presentation of said draft or order for payment as aforesaid, or at any time afterward, pay the said sum of money therein specified, or any part thereof, but has wholly refused so to do; whereof the said defendant then and there had due and legal notice; yet the said defendant hath not paid said sum of money, or any part thereof, to the said plaintiff.

Wherefore the said plaintiff prays judgment against the said defendant for the said sum of $, together with interest thereon from the said day of , A. D. 18 .

NOTE.—Interest becomes due from time of demand and notice of non-payment.

III.—*Bills of Exchange.*

71. DRAWER *v.* ACCEPTOR.

The said A B, plaintiff, complains of the C D, defendant, for that the said plaintiff, on the day of , A. D. 18 , at (*place of date,*) made his certain bill of exchange in writing of that date, and then and there directed the same to the said defendant, and thereby requested the said defendant , after the date thereof, to pay to the said plaintiff, or order, the sum of $, which said bill of exchange the said defendant afterward, on the day of , A. D. 18 , upon sight thereof accepted; yet the said defendant, though said period has long since elapsed for the payment of said bill of exchange, has not paid said sum of money, or any part thereof, to the said plaintiff.

Wherefore he prays judgment against the said defendant for the said sum of $, together with interest thereon from the day of , A. D. 18 .

72. DRAWER *v.* ACCEPTOR OF BILL PAYABLE AT A PARTICULAR PLACE.

The said A B, plaintiff, complains of the said C D, defendant, for that the said plaintiff, on the day of , A. D. 18 , at (*place of date,*) made his certain bill of exchange in writing of that date, and then and there directed the same to the said defendant, and thereby requested the said defendant, after date thereof, to pay to the said plaintiff, or order, the sum of $; which said bill of exchange the said defendant afterward, on the day of , A. D. 18 , upon sight thereof accepted, payable at the banking-house of , in , and the said plaintiff avers that afterward, and when said bill of exchange became due and payable, on the day of , A. D. 18 , at the said banking-house of the said , in , the said bill of exchange was duly presented for payment thereof, and payment thereof then and there required; yet the said defendant, nor any one for him, did not, nor would, when said bill of exchange was so presented for payment, nor at any time before or since, pay the said sum of money therein specified, or any part thereof, to the said plaintiff, but hitherto hath wholly refused so to do; of all which the said defendant then and there had due notice.

Wherefore the said plaintiff prays judgment against the said de-

fendant for the said sum of $, together with interest from the day of , A. D. 18 .

73. DRAWER *v.* ACCEPTOR ON A RETURNED BILL.

The said A B, plaintiff, complains of the said C D, defendant, for that the said plaintiff, on the day of , A. D. 18 , at (*place of date,*) drew his certain bill of exchange of that date, and then and there directed the same to the said defendants, and thereby requested the said defendants, after the date thereof, to pay to one E F, or order, the sum of $, and then and there delivered the said bill of exchange to the said E F, which said bill of exchange the defendant afterward, and before the same became due, upon sight accepted; and the said plaintiff avers that afterward, and when such bill of exchange became due and payable, the said bill of exchange, so accepted as aforesaid, was presented to the said defendant for payment thereof, and the said defendant was then and there requested to pay said sum of money therein specified; but the said defendant did not, nor would, at said time, when so presented for payment, or at any time since, pay the said sum of money therein specified, or any part thereof; and thereupon, on the day of , A. D. 18 , the said bill of exchange was returned to the said plaintiff for non-payment thereof; and the said plaintiff was then called upon and did pay to the said E F the said sum of $, in said bill specified, together with $, costs of protest, and $, damages for the non-payment thereof; of all which the said defendant had due notice; yet the said defendant, though often requested, has not paid said several sums of money, or either of them, or any part thereof.

Wherefore the said plaintiff prays judgment against said defendant for the said sum of $, together with interest thereon from the day of , A. D. 18 , and the said sum of $, costs, and the said sum of $, damages, so as aforesaid paid, together with interest thereon from the day of , A. D. 18 .

On a bill drawn on a person out of the State, the holder is entitled to six per cent. damages on its being protested for non-payment. Hence he is entitled to recover from the acceptor what he has been compelled to pay by reason of the failure of the acceptor to pay. For the law in Ohio, see Case *v.* Heffner, 10 Ohio, 180. The bill must be protested to entitle the holder to the statutory damages. A bill drawn in the State on one therein need not be

protested. Demand and notice may be proved by other evidence than the protest.

74. PAYEE *v.* ACCEPTOR.

The said A B, plaintiff, complains of the said C D, defendant, for that one E F, on the day of , A. D. 18 , at (*place of date.*) drew his certain bill of exchange in writing of that date, and then and there delivered the same to the said plaintiff, and thereby requested the said defendant to pay to the said plaintiff, or order, the sum of $, in after date thereof; which said bill of exchange the said defendant, on the day of , A. D. 18 , (or, then and there,) upon sight thereof, accepted; and yet the said defendant, although said period has long since elapsed, has not paid said sum of money therein specified, or any part thereof, to the said plaintiff, though often requested so to do.

Wherefore the said plaintiff prays judgment against the said defendant for the said sum of $, together with interest thereon from the day of , A. D. 18 .

Where a bill is drawn or indorsed in the name of a firm, it is unnecessary to state the names composing the firm. 2 Cow. 604; 4 Ib. 68. The bill may be described as drawn by A B & Co., and indorsed by A B & Co. It is necessary, however, to state the names of a firm on a bill, when the firm is a plaintiff or defendant. Cochran *v.* Scott, 5 Wend. 229.

So, where a bill is accepted by an agent, it is sufficient to say that A B, by C D, drew, indorsed, or accepted the bill. It is unnecessary to aver that the agent had authority. Sherman *v.* Comstock, 2 McLean, 19.

As to a firm: that A B & Co. drew a certain bill of exchange, and that A B & Co. indorsed the said bill of exchange.

As to bill by agent: that A B, by C D, drew his certain bill, etc.; that C D, by E F, upon sight, accepted; that G H, by I, indorsed said bill of exchange.

75. PAYEE *v.* ACCEPTOR AT A PARTICULAR PLACE.

The said A B, plaintiff, complains of C D, defendant, for that one E F & Co., on the day of , A. D. 18 , at (*place of date,*) drew their certain bill of exchange in writing of that date, and then and there delivered the same to the said plaintiff, and thereby requested the said defendant, months after the date thereof, to pay to the said plaintiff, or order, the sum of $; which said bill of exchange the said defendant then and there, upon sight thereof,

accepted, payable at the banking-house of , in ; and the said plaintiff avers that afterward, and when the said bill of exchange became due and payable, according to its tenor and effect, the said bill of exchange was duly presented for payment at the said banking-house of , in said , and payment of the said sum therein specified duly required; but neither the said C D, nor any other person, on behalf of the said defendant, did or would pay the said sum of money in said bill specified, or at any time before or afterward, but wholly neglected so to do.

Wherefore the said plaintiff prays, etc.

NOTE.—There is no necessity to aver or prove notice of dishonor of the bill in an action *v.* acceptor. 3 Cow. 261.

76. INDORSEE *v.* ACCEPTOR.

The said A B, plaintiff, complains of the said C D, defendant, for one E F, on the day of , A. D. 18 , at (*place of date,*) made his certain bill of exchange of that date, and then and there delivered the said bill to one G H, and thereby requested the said defendant, months after date thereof, to pay to the said G H, or order, the sum of $, which said bill of exchange the said defendant afterward, upon sight thereof, accepted; and the said G H afterward, and before the said bill became due, indorsed and delivered the same to one L M, and the said L M then and there indorsed and delivered the same to one N O, and the said N O then and there indorsed and delivered the same to the said plaintiff; yet the said defendant, although said period has elapsed, has not paid said sum of money, nor any part thereof, although often requested so to do.

Wherefore the said plaintiff prays judgment, etc.

77. PAYEE *v.* DRAWER ON DEFAULT OF ACCEPTANCE.

The said A B, plaintiff, complains of the said C D, defendant, for that the said C D, on the day of , A. D. , at (*place of date,*) made his certain bill of exchange in writing of that date, and then and there delivered the same to the said plaintiff, and thereby requested one E F to pay to the said plaintiff, or order, the sum of $, in days (or, months,) after the date thereof; and the said plaintiff avers that, after the making of said bill of exchange and before the same became due and payable, the said bill of exchange was presented to the said E F for his acceptance thereof, and the said E F was then and there requested to accept the same;

but the said E F did not, nor would, at the said presentation of said bill, nor at any time since, accept the same, or pay said money therein specified, but wholly neglected so to do; of all which said premises the said defendant then had due and legal notice; yet the said defendant has not paid the said sum of money, nor any part thereof, to the said plaintiff.

Wherefore the said plaintiff prays judgment, etc.

78. WHERE DRAWEE HAD NO EFFECTS OF DRAWER, TO EXCUSE NOTICE.

(*Follow the last to the averment of notice, and before that insert:*) and the said plaintiff avers that, at the time of the making of the said bill of exchange, and from thence and until and at the time when the same was presented for acceptance to the said E F, he, the said E F, had no effects of the said defendant, nor had he received any consideration from the said defendant for the acceptance or payment by him, the said E F, of the said bill of exchange; of all which said several premises he, the said defendant, then had due and legal notice; yet, etc. (*as in the last preceding.*)

79. PAYEE *v.* DRAWER ON DEFAULT OF PAYMENT.

The said A B, plaintiff, complains of the said C D, defendant, for that the said defendant, on the day of , A. D. 18 , at (*place of date,*) made his certain bill of exchange of that date, and then and there delivered the same to the said plaintiff, and thereby requested one E F to pay to the said plaintiff, or order, in after the date thereof, the sum of $, which said bill of exchange the said E F afterward, and before the same became due, upon sight thereof accepted; and the said plaintiff avers that afterward, on the day when the said bill of exchange became due and payable, according to the tenor and effect thereof, the said bill of exchange was presented to the said E F for the payment thereof, and the said E F was then requested to pay the said sum of money in said bill specified, but the said E F did not, nor would, at the said presentation thereof, or at any time afterward, pay the said sum of money therein specified, but wholly neglected so to do; of all which the said defendant then had due and legal notice; yet the said defendant, although often requested, has not paid said sum of money, nor any part thereof, to the said plaintiff.

Wherefore he prays judgment, etc.

80. PAYEE *v.* DRAWER OF BILL PAYABLE AT A PLACE CERTAIN.

The said A B, plaintiff, complains of the said C D, defendant, for that the said C D, on the day of , A. D. 18 , at (*place of date.*) made his certain bill of exchange of that date, and then and there delivered the same to the said plaintiff, and thereby requested one E F to pay to the said plaintiff, or order, in after the date thereof, the sum of $, which said bill of exchange the said E F afterward, and before the same became due and payable, accepted, payable at the banking-house of , in , and the said plaintiff avers that afterward, and on the day when said bill of exchange became due and payable, the said bill of exchange was duly presented at the banking-house of the said , in , for payment thereof, and payment thereof then and there requested, but neither the said (*the bankers*) nor said defendant, nor any person on behalf of the said E F, did or would, on the presentation of said bill for payment, or at any time since, pay the said sum of money in said bill of exchange specified, or any part thereof; of all which said several premises the said defendant had then due and legal notice.

Wherefore the said plaintiff prays judgment, etc.

81. AN AVERMENT THAT DRAWEE COULD NOT BE FOUND, TO EXCUSE DEMAND.

(*Follow the last until the averment of acceptance, then proceed:*) and the said plaintiff avers that afterward, and before the payment of the money in said bill specified, to wit, on the day of , A. D. 18 , and on various other days between that day and the time when said bill of exchange became due, and also on the day when the said bill of exchange became due, diligent search and inquiry was made after the said E F, at (*if any place of residence is stated in the bill*), and elsewhere, in order that the said bill of exchange might be presented to the said E F, for his acceptance and payment thereof; but the said E F could not on search and inquiry be found, nor hath he, at any time since the making of said bill of exchange, hitherto accepted the same, or paid the money therein specified; of all which the said defendant afterward had due and legal notice; yet the said defendant hath not paid said sum of money, or any part thereof, although often requested so to do.

Wherefore the said plaintiff prays judgment, etc.

82. AVERMENT OF WAIVER OF DEMAND AND NOTICE.

(*In lieu of the demand of payment, etc., insert:*) and the said plaintiff avers that the said defendant, before the said bill of exchange became due, requested the said plaintiff not to present the same to the said E F for payment thereof, and wholly dispensed with and discharged the said plaintiff from the presentment of the said bill of exchange to the said E F for payment thereof, and that therefore he did not present the same to the said E F for payment thereof; (*conclude with averment of non-payment and prayer for judgment, etc.*)

These forms will be sufficient to enable the pleader to frame any other. Where the suit is by an indorsee against the maker, all the averments are like those *v.* acceptor as to *drawing*, *indorsing*, and *presenting* the bill, with the exception that it is averred that the defendant drew the bill. One more may be given as a specimen of suit by indorsee.

83. INDORSEE *v.* INDORSEE.

The said A B, plaintiff, complains of the said C D, defendant, for that one E F, on the day of , A. D. 18 , at (*place of date*), made his certain bill of exchange of that date, and then and there delivered the same to one G H, and thereby requested one L M to pay to the said G H, or order, the sum of $, in days after the date thereof; which said bill of exchange afterward, and before the same became due, the said L M upon sight thereof accepted; and the said G H then and there indorsed and delivered the said bill of exchange to the said plaintiff, (or, to one N O, who then and there indorsed the same to the said plaintiff,) and the said plaintiff avers that afterward, and on the day when the said bill of exchange became due, the said bill of exchange was presented to the said L M, and the said L M then was requested to pay the sum of money therein specified, but the said L M refused so to do, nor hath he, nor any one else on his behalf, nor hath the said E F, nor any one on behalf of the said E F, paid said sum of money, or any part thereof; of all which premises the said defendant then had due and legal notice; yet the said defendant hath not paid said sum of money, or any part thereof, to the said plaintiff.

Wherefore he prays judgment, etc.

IV. *Actions against the several Parties to a Note or Bill.*

84. INDORSEE *v.* MAKER AND INDORSERS.

The said A B, plaintiff, complains of the said C D, E F, G H, L M, and N O, defendants, for that the said C D, on the day of , A. D. 18 , at (*place of date,*) made his certain promissory note in writing of that date, and then and there delivered the said note to the said E F, and thereby promised to pay to the said E F, or order, $, in days after the date thereof; and the said E F then and there indorsed and delivered the same to the said G H, and the said G H then and there indorsed and delivered the same to the said L M, and the said L M then and there indorsed and delivered the same to the said N O, and the said N O then and there indorsed and delivered the same to the said plaintiff; and the said plaintiff further avers that he, the said plaintiff, on the day when the said promissory note was due and payable, presented the same to the said C D, and then and there requested the said C D to pay the said sum of money therein stated; but that the said C D neglected and refused, on such request, to pay the said sum of money therein stated; of all which the said E F, G H, L M, and N O severally had due and legal notice; yet the said defendants, or either of them, have not paid said sum of money, or any part thereof, to the said plaintiff.

Wherefore the said plaintiff prays judgment against the said defendants for the sum of $, together with interest thereon from the day of , A. D. 18 .

NOTE.—The code allows an action to be brought by a remote indorsee against the maker and all prior indorsers.

85. INDORSEE *v.* ACCEPTOR, DRAWER, AND INDORSERS.

The said A B, plaintiff, complains of the said C D, E F, G H, L M, and N O, defendants, for that the said E F, on the day of , A. D. 18 , at (*place of date,*) made his certain bill of exchange in writing of that date, and then and there delivered the same to the said G H, and thereby requested the said C D to pay to the said G H, or order, in days after the date thereof, the sum of $; which said bill of exchange the said C D afterward, upon sight thereof, accepted; and the said G H then and there indorsed and delivered the same to the said L M, and the said L M then and there indorsed and delivered the same to the said N O, and the said N O then and there indorsed and delivered

the same to the said plaintiff; and the said plaintiff avers that, on the day when the said bill of exchange was due and payable, the same was presented and shown to the said C D for payment thereof, and the said C D was then and there requested to pay the said sum of money therein specified; but the said C D did not, nor would at the said time when said bill of exchange was so presented for payment, nor at any time afterward, pay the said sum of money, or any part thereof, but wholly neglected and refused so to do; of all which said several premises the said E F, G H, L M, and N O afterward had due and legal notice; yet the said defendants, or either of them, have not paid to the said plaintiff the said sum of money, or any part thereof.

Wherefore the said plaintiff, etc.

Swan Stat. 630, sec. 38. While this section allows all the parties to be joined, it does not change the nature of their liability; the maker is still the principal debtor, and the others are sureties in the order of their being indorsers. Alfred *v.* Watkins, 1 Code, N. S. 343; N. Y. Code, 1852, p. 95, sec. 120, note. The petition must show that the persons sued are parties to the instrument, and that the legal steps have been taken to charge them. Hence the petition must aver a demand of the maker on the day the note was due, and notice to the indorsers, and this is necessary even if the petition is filed under section 122 of the code. Swan Stat. 640, sec. 122. So held expressly in Bank of Geneva *v.* Gulick et al., 8 Pr. 51, by Welles, J.; and very decidedly intimated by Marvin. J., in Ranney *v.* Smith, 6 Pr. 420; and implied very clearly from the case of Lord *v.* Cheesebrough, 4 Sandf. S. C. 696.

The same rule applies to bills of exchange; the petition must show all the facts necessary to show the liability of the parties to the suit.

V. *Policies of Insurance.*

86. ON SEA POLICY.

The said A B, plaintiff, complains of the said Ætna Insurance Company, defendant, for that the said defendant, on the day of , A. D. 18 , at (*place where policy bears date,*) caused to be made a certain policy of insurance of that date, whereby the said defendant, in consideration of a certain premium then paid by the said plaintiff to the said defendant, then and there caused the said plaintiff to be insured, lost or not lost, in the sum of $, (*here set out the policy in the exact terms of it down to the "In witness."*)

And the said plaintiff saith that he did ship on board of the said , the said goods and merchandise in the said policy mentioned, to wit, (*here describe them as near as conveniently, or as described in the policy,*) of the value of $, to be carried and conveyed therein from the said port of to the said port of , as is in the said policy stated; and the said plaintiff avers that he was the owner of said goods and merchandise at the time of the making of the said policy of insurance, and from thence hitherto, until the loss thereof, as hereinafter set forth, and that the said goods and merchandise were of a greater value than the sum mentioned in said policy; and the said plaintiff further saith that said vessel (or, steamboat,) did, on the day of , A. D. 18 , with the said goods and merchandise on board thereof, depart and set sail from aforesaid, on her said voyage toward the port of aforesaid; and that afterward, and while said vessel (or, steamboat,) was proceeding on her said voyage, and before her arrival at the said port of , to wit, on the day of , A. D. 18 , the said vessel (or, steamboat,) was, with the said goods and merchandise of the said plaintiff on board, by the perils and dangers of the seas, (or lake, or river, *as the case may be,*) wholly lost, and the said goods and merchandise of the said plaintiff, on board thereof, became and were sunk and wholly lost to the said plaintiff, and never did arrive at aforesaid; of all which the said defendant, afterward, on the day of , A. D. 18 , had notice, and was then requested by the said plaintiff to pay him the said sum of $, so as aforesaid by said defendant insured on said goods and merchandise; yet the said defendant hath not paid said sum of $, or any part thereof, to the said plaintiff, to the damage of the said plaintiff of $.

Wherefore the said plaintiff prays judgment against the said defendant for the said sum of $, his damages so as aforesaid sustained.

87. LOSS BY BEING RUN INTO.

(*Follow* 86 *to the averment of loss, then proceed:*) and the said plaintiff avers that, whilst the said ship or vessel in said policy named, with the said goods and merchandise on board thereof, was proceeding on her said voyage, and before her arrival at her said port of destination in the said policy of insurance mentioned, a certain other vessel (or, steamboat,) with great force and violence was carried against and ran foul of the said ship in said policy named, and the same thereby then became and was sunk and lost,

with the said goods and merchandise of the said plaintiff so shipped thereon, and said goods and merchandise thereby became and were wholly lost to the said plaintiff; of all which said several premises the said defendant, etc. (*as in* 86.)

88. ON FIRE POLICY.

The said A B, plaintiff, complains of the said Ætna Insurance Company, defendant, for that the said defendant, in consideration of a certain premium, by and between the said plaintiff and defendant agreed upon, and by the said plaintiff then paid, to wit, the sum of $, on the day of , A. D. 18 , at , did, by a certain policy of insurance of that date, duly executed, insure the said plaintiff against loss or damage by fire to the amount of $ (*here copy the whole policy, not including the attestation and signing*); and the said plaintiff further saith that, at the time of the date of said policy of insurance, the said plaintiff was the owner of the said dwelling-house and the said furniture, etc., (*as stated in policy,*) and so continued from thence up and until the time of the said loss hereinafter mentioned; and the said plaintiff further saith that he has duly kept, observed, and performed all the requirements and conditions contained in said policy, and in the schedule thereto attached, by him, the said plaintiff, to be kept, observed, and performed in that behalf; and the plaintiff further avers that afterward, on the day of , A. D. 18 , the said dwelling-house and the said furniture, (or, goods, *as in policy,*) named in said policy, became and were consumed and wholly destroyed by fire; of all which the said defendant afterward, to wit, on the day of , A. D. 18 , had due and legal notice; and the said plaintiff further saith that he has been damaged by the burning of the said dwelling-house and furniture to the amount of the said sum of $, and over; yet the said defendant, although the said plaintiff has duly done and performed, all and singular, the requirements and conditions by said policy, and the schedule thereto attached, required to be done and performed by the said plaintiff, to entitle him to the payment of said amount of loss so sustained by said plaintiff, and to render the said defendant liable to pay the same, not regarding his said duty in the premises, did not, nor would pay the said sum of $, nor any part thereof, to the said plaintiff, but hitherto and still refuses so to do, to the damage of the said plaintiff of $.

Wherefore the said plaintiff prays judgment against the said

defendant for the said sum of $, his damages so as aforesaid sustained.

The general averment of the performance of conditions is sufficient under the code. Swan's Stat. 640, sec. 121. "In pleading the performance of conditions precedent in a contract, it shall be sufficient to state that the party duly performed all the conditions on his part." The defendant can then take issue on the performance of any of the conditions stated in the contract. Hence all the conditions must be set forth, and in this case, not only the policy, but the schedule attached to the policy, should be set out in the petition.

Where a policy has a condition that the insured, in case of a loss, shall give immediate notice thereof, and within three calendar months deliver, under his hand, accounts exhibiting the loss sustained, etc., the insured is not entitled to recover unless he has so made out the accounts within the three months. Mason *v.* Harvey, 20 Eng. L. & Eq. 541. So, where he was to get the certificate of a minister as to the loss, he can not recover unless he can obtain such certificate. Worsley *v.* Wood, 6 Term, 710; S. C., 2 H. Bl. 574. The same doctrine is recognized in Moore *v.* Protection Ins. Co., 29 Maine, 97. But if the party has once submitted to an examination, where that is required, he has fulfilled the condition, even if he refuses to be further examined. Ib.

This defense, in 20 Eng. L. & Eq. 541, was set up by a plea setting forth the condition; hence it seems it need not be stated in the declaration.

VI. *On Awards.*

89. ON PAROL SUBMISSION.

The said A B, plaintiff, complains of the said C D, defendant, for that, before the making of the promises of the said defendant hereinafter mentioned, certain differences and disputes had arisen and were depending between the said plaintiff and the said defendant, touching and concerning certain dealings before that time had by and between the said parties; and thereupon, for the putting an end to said differences and disputes, the said plaintiff and the said defendant, on the day of , A. D. 18 , respectively submitted themselves to the award of one E F, to be made between them of and concerning the said differences and disputes; and in consideration thereof, and that the said plaintiff, at the request of the said defendant, had then and there promised the said defendant to

perform the award of the said E F, to be so made between the said plaintiff and the said defendant, of and concerning the said differences and disputes, in all things therein contained, on the said plaintiff's part in that behalf to be performed, he, the said defendant, promised the said plaintiff to perform the said award in all things therein contained, on the behalf of said defendant to be performed. And the said plaintiff saith that the said E F, having taken upon himself the burden of the said arbitrament, did, on the day of , A. D. 18 , (*date of the award,*) make his certain award between the said plaintiff and the said defendant, of and concerning the said differences and disputes, and did thereby award that, (*here set forth the award in words, or according to its legal effect, and then aver a non-performance of his part; if there are any acts to be done by the plaintiff before he has a right to recover what he sues for, performance of all such acts must be averred preceding an averment of the default of the defendant,*) the said defendant should, on the day of , A. D. 18 , pay to the said plaintiff the sum of $, in full satisfaction and discharge of the said matters in difference and dispute; of which said award the said defendant then and there had notice; and the said plaintiff saith that, on the said day of , A. D. 18 , he, the said plaintiff, requested the said defendant to pay him, the said plaintiff, the said sum of $, according to the tenor and effect of said award; yet the said defendant did not, nor would, when so requested as aforesaid, or at any time since, pay the said sum of $, or any part thereof, but to do so hath hitherto wholly refused.

Wherefore the said plaintiff prays judgment against the said defendant for the said sum of $, together with interest thereon from the said day of , A. D. 18 .

Parol submission is binding. 1 Saund. 28; 8 Term, 571; 5 East, 139; Shepherd *v.* Watrous, 3 Caine, 166; Mitchell *v.* Bush, 7 Cow. 187; Titus *v.* Scantling, 4 Blackf. 89; 6 Dana, 9. On a parol submission, the award can not be made a rule of court. Shearer *v* Mooers, 19 Pick. 308.

As to whether an averment of notice is necessary, see 2 Saund. 62, *a*, n. 4; 9 Mass. 198; 7 B. & C. 494.

Where the award provided that on payment a release should be given, it was held necessary to aver a tender of the release when demanding the money. Huggy *v.* Collins, 3 Har. 294. Where, however, moneys are directed to be paid by one to the other simply, no demand is necessary. Nichols *v.* Rensselaer Ins. Co. 22 Wend. 125

90. ON AN AWARD WHERE SUBMISSION IS BY DEED OR BOND.

The said A B, plaintiff, complains of the said C D, defendant, for that certain differences having arisen and being depending between the said plaintiff and the said defendant, the said plaintiff and defendant entered into certain articles of agreement, under their respective seals, to submit such differences to the arbitrament of , and which agreement is to the substance and effect following, that is to say: (*here set out the agreement to arbitrate, either literally or in its legal effect.*) And the said plaintiff further saith that the said E F, etc., (*the arbitrators named,*) having taken upon themselves the burden of the said arbitration, did, in due manner and within the time limited for that purpose in said agreement, on the day of , A. D. 18 , (*date of the award,*) duly make and publish their award in writing, subscribed with the proper hand of each of said arbitrators of and concerning the said matters in difference between the said parties, ready to be delivered to the said parties, or to such of them as should desire the same, and bearing date the said day of , A. D. 18 , and did thereby award and direct (*here set out the award, or so much as is necessary to show the plaintiff's right to recover what he claims, and then aver a performance of all acts to be done by plaintiff's conditions precedent to his right to demand what he sues for, and then aver a non-performance by the defendant of his part of the award; what follows will illustrate what is meant:*) that the said plaintiff should deliver to the said defendant a certain note of hand, given by one to the said defendant, and which note was then in the hands of said plaintiff, and that said defendant should then pay to the said plaintiff the sum of $, and the plaintiff avers that afterward, to wit, on the day of , A. D. 18 , he did tender and offer to the said defendant the said note of hand above described, and then and there requested the said defendant to pay the said sum of $, in said award named, to the said plaintiff; but the said defendant then and there refused to receive the said note of hand, and did not, nor would pay the said sum of $, but hitherto hath wholly refused to to do; and the said plaintiff brings here into court the said note of hand, ready to be delivered to the said defendant whenever he will receive the same.

Wherefore the said plaintiff prays judgment against the said defendant for the said sum of $, together with interest thereon from the said day of , A. D. 18 .

An award need not be under seal unless required to be by the article of submission.

The award must show that the arbitrators met at the place specified in the submission. Strum *v.* Cunningham, 3 Ohio, 286. It must be final. Thomas *v.* Moler, 3 Ohio, 266. So where the award directed notes to be given by a party, with such security as certain persons named should approve of, it was held not to be final and void, because something was yet to be done; the security was to be approved of. Maxon *v.* Payne, Nash's Dig. 24, sec. 5.

VII. *For Forbearance of Debts due.*

91. TO PAY FOR FORBEARANCE OF DEFENDANT.

The said A B, plaintiff, complains of the said C D, defendant, for that before the making of the promise of the said defendant hereinafter mentioned, the said plaintiff had commenced a certain action against the said defendant in the Court of Common Pleas, within and for the county of , for the recovery of certain money then claimed by the said plaintiff to be due and owing to him from the said defendant; and whilst the said action was still pending in said court, in consideration that the said plaintiff would dismiss and discontinue his said action at the costs of him, the said plaintiff, the said defendant did, on the day of , A. D. 18 , promise the said plaintiff to pay him, the said plaintiff, the sum of $, in full discharge and payment of the said claim of the said plaintiff against the said defendant, in days after the said action should be so dismissed and discontinued; and the said plaintiff avers that he did then and there agree to, and did then and there dismiss and discontinue the said action at his, the said plaintiff's own costs and charges; and that he did then and there notify said defendant that said action had been so dismissed, whereby the said defendant became liable to pay said sum of $, in days from and after the said day of , A. D. 18 ; yet the said defendant hath not paid said sum of $, or any part thereof, to the said plaintiff, although said period is elapsed, and said defendant has been often requested so to do.

Wherefore the said plaintiff prays judgment against the said defendant for the said sum of $, together with interest thereon from the said day of , A. D. 18 .

92. FOR FORBEARANCE TO A THIRD PERSON.

The said A. B, plaintiff, complains of the said C D, defendant, for that one E F, before and at the time of the making of the

promise of the said defendant hereinafter mentioned, was indebted to the said plaintiff in the sum of $, and thereupon, on the day of , A. D. 18 , in consideration of the premises, and that the said plaintiff, at the request of the said defendant, would forbear and give time to the said E F, for the payment of the said sum of $, until the day of , A. D. 18 , (*this must agree with facts,*) he, the said defendant, then and there promised the said plaintiff to pay him the said sum of $, in case the said E F should not, on or before the said day of , A. D. 18 , pay to the said plaintiff the said sum of $, (*let this statement agree with the facts.*) And the said plaintiff avers that, confiding in the said promise of the said defendant, he did forbear and give time to the said E F for the payment of the sum of $, until the said day of , A. D. 18 ; yet the said E F did not nor would pay the said sum of $ to the said plaintiff on or before the said day of , A. D. 18 , nor hath he since paid said sum; of all which the said defendant afterward, on the said day of , A. D. 18 , had notice; yet the said defendant hath not paid said sum of money, or any part thereof, to the said plaintiff.

Wherefore the said plaintiff prays judgment against the said defendant for the said sum of $, together with interest thereon from the said day of , A. D. 18 .

VIII. *On Warranties.*

93. WARRANTY OF HORSES AND CATTLE TO BE SOUND.

The said A B, plaintiff, complains of the said C D, defendant, for that the said defendant, on the day of , A. D. 18 , in consideration that the said plaintiff, at the request of the said defendant, would buy of the said defendant a certain horse, (cow, ox, sheep, mule, jack, etc.,) at and for a certain price or sum of money, to wit, for the sum of $, to be therefor paid by the said plaintiff, he, the said defendant, then promised the said plaintiff that the said horse, (or, cow, etc.,) was sound, (or, free from vice, or, broken to draw, gentle in harness, a good saddle-horse, *or any other particular wherein the animal is warranted; as, that a cow was a good milker and would give per day a certain quantity of milk. The warranty must be stated according to the fact.*) And the said plaintiff avers that he, confiding in the promise of the said defendant, did then buy the said horse, (or, other animal, *as the case is,*) of the said defendant, and then paid him therefor the said sum of $;

yet the said defendant did not perform his said promise; for that the said horse at the time of making said promise was not sound, but unsound, and became of no use to the said plaintiff, and the said plaintiff hath been put to expense in feeding, keeping, and taking care of said horse, amounting to the sum of $; and the said plaintiff avers that he hath sustained damages by reason thereof to the sum of $.

Wherefore he prays judgment against the said defendant for the said sum of $, his damages so as aforesaid sustained.

94. ON AN EXECUTED CONSIDERATION.

The said A B, plaintiff, complains of the said C D, defendant, for that on the day of , A. D. 18 , in consideration that the said plaintiff, at the request of the said defendant, had then bought of the said defendant a certain horse, (or, cow, etc.,) at and for a certain price then agreed upon between the said plaintiff and the said defendant, he, the said defendant, then promised the said plaintiff that the said horse, (or, other animal,) at the time of the said sale thereof, was sound; yet the said plaintiff saith that, at the time of said sale, the said horse was not sound, but unsound, and became wholly useless and of no value to the said plaintiff; whereby the said plaintiff has sustained damages to the sum of $, as he avers.

Wherefore the said plaintiff prays judgment against the said defendant for the said sum of $, his damages so as aforesaid sustained.

95. WARRANTY ON AN EXCHANGE.

The said A B, plaintiff, complains of the said C D, defendant, for that, on the day of , A. D. 18 , in consideration that the said plaintiff, at the request of the said defendant, would deliver to the said defendant a certain horse, (or, other animal, *as the case may be,*) of the said plaintiff, of the value of $, in exchange for a certain mare of the said defendant, he, the said defendant, then promised the said plaintiff that the said mare of the said defendant was then sound; and the said plaintiff avers that he, confiding in the said promise of the said defendant, did afterward then deliver to the said defendant the said horse of the said plaintiff, (*if any money was paid, add:* and paid to the said plaintiff the sum of $,) in exchange for the said mare of the said defendant; and the said plaintiff avers that, at the time of the said exchange, the said mare of the said defendant was not sound, but, on the contrary, was

unsound; whereby the said plaintiff has sustained damages to the amount of $.

Wherefore he prays judgment against the said defendant for the said sum of $, his damages so as aforesaid sustained.

These forms can be applied to any description of warranty—of things, goods, and chattels, as well as of animals. The warranty, being a contract, must be correctly described, and be as comprehensive as the breach complained of; all exceptions must also be set out. Therefore, if a horse be warranted sound, except a kick in the leg, the exception must be stated. 4 B. & C. 445.

The vendor of personal property warrants the title to it. This the law implies. Darst *v.* Brockway, 11 Ohio, 462; 3 Term, 57; Chancellor *v.* Wiggins, 4 B. Mon. 201. Nor will the implication be excluded, when the sale is made by a deed without warranty. Trigg *v.* Faris, 5 Humph. 343, 496; Kingsbury *v.* Taylor, 29 Maine, 508; 2 Sand. S. C. 89.

A good price does not imply a warranty on soundness. 2 East, 314; 4 Camp. 144; 9 Porter, 104; Welsh *v.* Carter, 1 Wend. 185; Dresser *v.* Ainsworth, 9 Barb. 619. This rule does not apply where the property is not in the possession of the vendor at the time of sale. Edick *v.* Crim, 10 Barb. 445. Where, however, an article is sold to be used for a particular purpose, there is an implied warranty that it will answer for that purpose, at least against all defects not visible. Brenton *v.* Davis, 8 Blackf. 317; 8 Ib. 518. Dickson *v.* Jordan, 11 Ired. 272, seems contra. This last was the sale of a rope, which turned out not fit for the purpose for which bought. Yet if the vendee asks for a carriage-horse, the vendor undertakes impliedly that he is a carriage-horse. 2 Chit. Pl. 278; 5 Bing. 544; 4 Camp. 169; 6 Taunt. 108; 4 B. & C. 115.

A warranty may be implied from the production of a sample. 4 Camp. 22, 144, 169; 4 B. & A. 387; 3 Starkie, 32. The vendor is responsible that the bulk of the commodity shall be equal to the sample in quality. Andrews *v.* Kneeland, 6 Cowen, 354; Oneida Manuf. Co. *v.* Lawrence, 4 Ib. 440; Bradford *v.* Manley, 13 Mass. 120; Gallagher *v.* Waring, 9 Wend. 20; 12 Ib. 413, 566; Williams *v.* Spofford, 8 Pick. 250.

A general warranty will not extend to defects that are plain and obvious to the senses of the purchaser. 2 Bla. Com. 165; 1 Salk. 211; 2 Bing. 183; 5 B. & A. 240; 3 Camp. 154.

The particular description of unsoundness need not be stated. 2 Chit. Pl. 280; Com. Dig. Pleader, C. 45; 2 Saund. 181, *b*; 3

Term, 307 ; 1 Chit. Pl. 291. And where even special defects were stated, it was held that other defects might be shown under the general averment of unsoundness. Fleming *v.* Toler, 7 Grat. 310.

96. ON WARRANTY TO PACK UP MEAT OR HAMS FOR A PARTICULAR MARKET.

The said A B, plaintiff, complains of the said C D, defendant, for that on the day of , A. D. 18 , in consideration that the said plaintiff, at the request of the said defendant, had then promised the said defendant to buy of the said defendant, (*here describe goods generally, as*, barrels of pork, tierces of shoulders, 1,000 hams, etc.,) for a certain price then agreed upon between the said plaintiff and the said defendant, amounting to $, he, the said defendant, then promised the said plaintiff to furnish said goods and merchandise as aforesaid, properly preserved and packed up for the English market, and to put the same up properly for a voyage to the said English market; and the said plaintiff avers that, confiding in the said promise of the said defendant, he, the said plaintiff, did then buy of the said defendant (*here set forth the goods bought*,) as and for the same goods and merchandise so agreed to be bought as aforesaid, and which the said defendant then supplied and furnished to the said plaintiff, as and for such goods and merchandise ; yet the said plaintiff saith that the said defendant did not, nor would furnish such goods and merchandise fit to be sent to the English market as aforesaid, or pack them properly for the said voyage; but the said plaintiff saith that the goods and merchandise were so negligently and improperly preserved and put up, that by reason thereof, the same were wholly unfit for the purpose aforesaid, and the said plaintiff thereby lost all benefit thereof, and was put to the expense of $, in and about the shipping and conveying the same to the said English market as aforesaid; whereby the said plaintiff has sustained damages, as he avers, to the amount of $.

Wherefore he prays judgment against the said defendant for the said sum of $, his damages so as aforesaid sustained.

97. ON WARRANTY OF MILLSTONES.

The said A B, plaintiff, complains of the said C D, defendant, for that in consideration that the said plaintiff, at the request of the said defendant, would buy of him the said defendant, a certain pair of French buhr millstones, four feet in diameter, made by W. W. Wallace, of the city of Pittsburg, at and for a certain price then agreed upon by and between the said plaintiff and defendant, he,

the said defendant, promised the said plaintiff that the said millstones were then good both in quality and workmanship; and the said plaintiff avers that, confiding in said promise of the said defendant, he did then buy the said millstones of the said defendant; and the said plaintiff saith that the said millstones were not then good both in quality and workmanship, but were defective and became useless to the said plaintiff; to his damage $.

The said plaintiff, therefore, prays judgment against the said C D for the said sum of $, his damages so sustained.

NOTE.—The price or amount paid for the article warranted need not be stated; but if stated it must be proved as stated. McMillan *v.* Theaker, 12 Ohio, 24; 3 Bing. 472; 1 Term, 447; 2 Lord Raymond, 792; 1 Chit. Pl. 326; 3 Term, 67; 3 M. & S. 173; 6 East, 563; 13 Ib. 102; 3 Day, 312. Breach may be assigned as broad as the covenant. 1 Hall, 33.

IX. *Relating to the Sale of Real Estate.*

98. AGAINST VENDOR OF REAL ESTATE SOLD AT AUCTION FOR NOT MAKING A GOOD TITLE.

The said A B, plaintiff, complains of the said, C D, defendant, for that the said defendant, on the day of , A. D. 18 , caused to be put up and exposed to sale, by public auction, the following real estate; that is to say: (*here describe the premises as in particulars of sale,*) upon and subject to the following conditions; that is to say: (*here set out any conditions which may have reference to the plaintiff's claim as they appear in the particulars of sale; set them out in the past tense;*) that the purchaser should pay to the vendor, or his agent, a deposit of $ per cent. in part of the purchase money, and should likewise pay one-half of the auction duty, and should pay the residue of the purchase money, and complete the purchase on or before the day of then next, and that a good title should be made out at the expense of the vendor; and upon payment of the residue of the purchase money, a proper conveyance at the expense of the purchaser. And the said plaintiff saith that on such exposure to sale as aforesaid, he, the said plaintiff, became and was the purchaser of the said premises, upon and according to the said conditions, for the price of $, and then paid to the said defendant the sum of $, as a deposit of $ per cent. in part of the said purchase money, and $, as one-half of the said auction duty, payable in that behalf; and

the said plaintiff further saith that, in consideration of the premises, the said defendant then promised the said plaintiff to perform all things in said conditions of sale contained on the vendor's part to be performed; and the said plaintiff further saith that, on the said day of then next after, he, the said plaintiff, was ready and willing to perform all things in said conditions contained on his behalf, as such purchaser, to be performed, and to pay the residue of the said purchase money, and to complete the said purchase, whereof the said defendant then had notice, and was then requested by the said plaintiff to make to him a good title to the said premises; but yet the said defendant did not, nor would, when so requested, or at any time since, make or procure to be made to the said plaintiff a good title to the said premises, but hath hitherto wholly neglected and refused so to do: by reason whereof the said plaintiff has been deprived of all benefit which would have resulted to him from the completion of said purchase, and hath been put to the expense of $, in endeavoring to procure such title as aforesaid, and from the use of the said moneys so paid and advanced as aforesaid, to his damage, as he saith $.

Wherefore the said plaintiff prays judgment against the said defendant for the said sum of $, his damages so as aforesaid sustained.

99. VENDOR *v.* PURCHASER FOR NOT COMPLETING SALE WITH LOSS ON A RESALE.

The said A B, plaintiff, complains of the said C D, defendant, for that the said plaintiff, on the day of , A. D. 18 , by one E F, his auctioneer and agent in that behalf, caused to be put up and exposed to sale, by public auction, the following real estate, that is to say: (*here describe it as briefly as possible, so that the description will identify the land,*) upon and subject to the following conditions of sale, (*here set out all that relates to defendant's purchase and the cause of action, as in the last form.*) And the said plaintiff further saith that the said defendant was then the highest bidder for, and then became, and was in due manner declared to be, the purchaser of the said premises, at and for the sum of $; and thereupon the said defendant, in part performance of the said condition of sale and of his said purchase, did then pay down the sum of $, that being for the per cent. on the said sum of $, as a deposit, and did then sign an agreement in writing for the payment of the residue of such purchase money on or before the said day of , A. D. 18 , on having a good title; and

the said plaintiff avers that, before and after the said day of , A. D. 18 , he, the said plaintiff, was ready and willing to make, and did offer to make, to the said defendant a good and sufficient title in fee simple to the said premises, and did then offer and tender to deliver to the said defendant a proper conveyance of the said premises, conveying from the said plaintiff to the said defendant a good title in fee simple to said premises, with covenants of general warranty upon the payment of the residue of the said purchase money, according to the conditions of said sale; yet the said defendant did not, nor would, on or before the said day of , A. D. 18 , on having such good title, or at any other time, pay to the said plaintiff the residue of the said purchase money, or any part thereof, but then wholly refused so to do; and thereupon the said plaintiff afterward, on the day of , A. D. 18 , by virtue of said conditions of sale, again exposed said premises to sale by public auction, and the same were then resold for the sum of $, whereby there was a loss to the said plaintiff of $ on such resale, and the charges attending the same amounting to the sum of $; of all which said premises the said defendant afterward had notice, and became liable to pay to the said plaintiff the said sums of $, and of $ aforesaid; yet the said defendant, though afterward, on the day of , A. D. 18 , requested so to do, has not paid said several sums of money, or any part thereof, to the said plaintiff, to his damage $.

Wherefore the said plaintiff prays judgment against the said defendant for the said sums of $, his damages so as aforesaid sustained.

NOTE.—Interest will run from the day of the demand, as he did not become liable to pay till such notice and demand.

X. *On Guaranties.*

100. FOR PAYMENT OF GOODS SOLD TO ANOTHER PARTY.

The said A B, plaintiff, complains of the said C D, defendant, for that on the day of , A. D. 18 , in consideration that the said plaintiff, at the request of the said defendant, would (*here set out the terms of the guaranty as relates to the consideration for it. It may be given as follows as a sample:*) sell and deliver to one E F on credit all such goods as he, the said E F, should have occasion for, and require of the said plaintiff, in the way of his trade and business of hemp merchant, he, the said defendant, promised the

said plaintiff (*here set out the promise according to its legal effect, or in words:*) to be accountable to the said plaintiff for whatever goods he, the said plaintiff, should sell and deliver to the said E F, as aforesaid. And the said plaintiff avers that he did sell and deliver to the said E F on credit certain goods, which he, the said E F, had occasion for, and did require of said plaintiff, in the way of his said trade and business, and for reasonable prices then agreed upon between the said plaintiff and the said E F, amounting in the whole to the sum of $, and that the credit and time for payment of the said goods by the said E F to the said plaintiff has long since expired, and yet the said E F has not paid the said plaintiff the said sum of $, or any part thereof, but hath wholly neglected so to do; of all which premises the said defendant, on the day of , A. D. 18 , had notice; yet the said defendant hath not as yet paid to the said plaintiff the said sum of $, although he was, on the said day of , A. D. 18 , requested by said plaintiff so to do; to the damage of the said plaintiff $.

Wherefore the said plaintiff prays judgment against the said defendant for the said sum of $, his damages so as aforesaid sustained.

The sum demanded of the defendant should be enough to cover the sum due from E F at time of demand, and the interest to be calculated thereon. He was bound to pay what E F owed at the time of the demand; hence that sum is his debt.

As to the law of guaranties, see 12 East, 237; 2 Camp. 413; 6 Bing. 244; 1 B. & C. 10; 15 Ves. Jr. 286; Packard *v.* Richardson, 17 Mass. 122; 17 Wend. 179.

Guarantor is entitled to a notice that his guaranty has been accepted. Oaks *v.* Weller, 13 Vt. 106; Hawk *v.* Crittenden, 2 McLean, 557; 2 Ib. 21; How *v.* Nichols, 9 Shepley, 175; Hill *v.* Colvin, 4 How. (Miss.) 231.

Where the guaranty relates to a bill of goods, the guarantor must be immediately notified of its acceptance. Taylor *v.* Wetmore, 10 Ohio, 490. This notice must be given in a reasonable time. Mussey *v.* Raynor, 22 Pick. 223. A reasonable time, however, must be as soon after the credit as a party can conveniently send the notice. Norton *v.* Eastman, 4 Greenl. 521; Tuckerman *v.* French, 7 Ib. 115; Babcock *v.* Bryant, 12 Pick. 133; Beekman *v.* Hale, 17 Johns. 134; 3 Cowen, 438; 1 Mason, 324.

The guaranty must, under the statute of frauds, be in writing.

The consideration, however, need not be stated in the writing. Packard *v.* Richardson, 17 Mass. 122.

A guaranty addressed to a particular firm or individual does not authorize any but the person or persons addressed to give a credit on it. Taylor *v.* Wetmore, 10 Ohio, 490.

XI. *On Promises to Marry.*

101. NOT MARRYING ON REQUEST.

The said A B, plaintiff, complains of the said C D, defendant, for that on the day of , A. D. 18 , in consideration that the said plaintiff, being then sole and unmarried, at the request of the said defendant, had then promised the said defendant to marry him, the said defendant, when she, the said plaintiff, should be thereunto afterward requested, he, the said defendant, then promised the said plaintiff to marry the said plaintiff, when he, the said defendant, should be thereunto afterward requested; and the said plaintiff avers that she, confiding in said promise of the said defendant, has always, from thence hitherto, remained and still is sole and unmarried, and has been for and during all the time aforesaid, and still is, ready and willing to marry the said defendant, whereof the said defendant has always had notice; and the said plaintiff afterward, to wit, on the day of , A. D. 18 , requested the said defendant to marry her, the said plaintiff; yet the said defendant then refused so to do, nor would, at the said time when he was so requested, or at any time before or since, marry the said plaintiff, but hitherto has wholly refused so to do; to the damage of the said plaintiff, as she avers, $.

Wherefore the said plaintiff prays judgment against said defendant for the said sum of $, her damages so as aforesaid sustained.

102. FOR MARRYING ANOTHER.

(*State the promise as in the last form, and the breach as follows:*) yet the said defendant, not regarding his said promise, did, after the making of said promise, on the day of , A. D. 18 , wrongfully marry one , contrary to his said promise, and to the damage of the said plaintiff, as she avers, $.

Wherefore the said plaintiff prays judgment, etc.

103. ON PROMISE TO MARRY IN A REASONABLE TIME.

The said A B, plaintiff, complains of the said C D, defendant, for that on the day of , A. D. 18 , in consideration that the

said plaintiff being then unmarried, at the request of the said defendant, had then promised the said defendant to marry him, the said defendant, he, the said defendant, promised the said plaintiff to marry her, the said plaintiff, in a reasonable time then next following; and the said plaintiff avers that, confiding in said promise of the said defendant, she has always hitherto remained, and still is unmarried, and hath been during all of said time, and still is, ready and willing to marry the said defendant; of all which the said defendant has always had notice; and the said plaintiff avers that a reasonable time has elapsed for the said defendant to marry the said plaintiff since the making of the said promise of the said defendant; and that the said plaintiff, after the lapse of such reasonable time, did, on the day of , A. D. 18 , request the said defendant to marry her, the said plaintiff; yet the said defendant then, and before, and ever since the said time of the making of said request, did not, nor would, within such reasonable time, or at any other time, marry the said plaintiff; but hitherto hath wholly refused so to do, to the damage of the said plaintiff, as she avers, $.

Wherefore she prays judgment against the said defendant for the said sum of $, her damages so as aforesaid sustained

NOTE.—Where the promise is to marry on a fixed day, the above forms can be easily adapted. The averment of the promise will be to marry on such a day, and the breach that he did not marry on that day, though the defendant was then ready and willing, nor at any other time.

XII. *On Promises to Serve and Employ.*

104. FOR NOT RECEIVING ONE HIRED.

The said A B, plaintiff, complains of the said C D, defendant, for that, on the day of , A. D. 18 , in consideration that the said plaintiff, at the request of the said defendant, had then agreed with the said defendant to enter into his, the said defendant's service, as , and to serve the said defendant in that capacity at the rate of $ per year, (or, month, or, week,) to be paid therefor by the said defendant to the said plaintiff during his continuance in said service, he, the said defendant, then promised the said plaintiff to receive him into the service of the said defendant, in the capacity aforesaid, and to retain and employ him in such service for the wages aforesaid and the said

plaintiff avers that, confiding in the said promise of the said defendant, he hath always been ready and willing to enter into the service of the said defendant, in the capacity aforesaid, for the wages aforesaid; and that the said plaintiff afterward, on the day of , A. D. 18 , requested the said defendant to receive the said plaintiff into the service of the said defendant in the capacity aforesaid, and to retain and employ him in such service at the wages aforesaid; yet the said defendant did not, nor would, at the time he was so requested, or at any time afterward, receive the said plaintiff into the service of the said defendant, or retain or employ him in such service, at the wages aforesaid, but wholly neglected and refused so to do; whereby the said plaintiff not only lost the benefit of being so employed, but lost various chances of being employed by divers other persons, and remained out of employment for the space of months then next ensuing, and necessarily expended $ in preparing and going to the said defendant, to enter upon said service, and was otherwise greatly injured, to the damage of the said plaintiff, as he avers, $.

Wherefore the said plaintiff prays judgment against the said defendant for the said sum of $, his damages so as aforesaid sustained.

105. ON A BUILDING AGREEMENT; FOR NOT DOING PART, AND DOING BALANCE BADLY.

The said A B, plaintiff, complains of the said C D, defendant, for that, on the day of , A. D. 18 , (*date of agreement*,) by a certain agreement then made by and between the said plaintiff and the said defendant, it was agreed that the said defendant, (*here set out the agreement in words, or its legal effect*,) and the said plaintiff saith that he did duly perform, all and singular, the conditions aforesaid on his part to be performed; but that the said defendant, not regarding his said promise, did not, nor would perform, (*here set out the work not done, or left undone*,) and the said plaintiff further avers that the said defendant performed and did the residue of the said work in so bad, unskillful, and unworkmanlike manner; that the same was of little or no value to the said plaintiff, to the damage of the said plaintiff, as he avers, $

Wherefore the said plaintiff prays, etc.

Where the the workman finds materials, an averment of bad materials may be inserted, if such was the fact. Under the system

of making oath to any pleading, great care must be taken in setting out these special agreements, and forms can be used only as guides and hints as to the necessary averments and the order of their arrangement.

As to conditions precedent, their performance can be specially averred, or generally, under the code. Where there is to be no dispute on the performance of them, the general form is well enough; but where issue is to be taken on the performance of any condition, it will be best to aver a specific performance, and the defendant will then have specifically to meet it by a denial; so that there can be, on the trial, no uncertainty as to what is in issue between the parties.

The rule for declaring on the special agreement is plain:

1. The contract must be set forth.

2. That the plaintiff did all he was to do on his part; that he furnished all lumber, if he was to do it; that he paid all sums he was to pay; and any other act which must precede the doing of the act for the not doing of which he sues.

3. That the defendant either did not do the work or act he was to do, or that, doing it, he did it badly and in an improper manner.

4. The statement of the damages sustained. If special damages have been sustained, these must be specially set out in the petition, or they can not be recovered. Numerous forms may be found in 2 Chitty on Pl. 324 and seq.

XIII. *Against Agents, etc.*

106. FOR SELLING GOODS CONTRARY TO ORDER.

The said A B, plaintiff, complains of the said C D, defendant, for that, on the day of , A. D. 18 , in consideration that the said plaintiff, at the request of the said defendant, had retained and employed the said defendant to sell and dispose of, for cash or approved bill, at a short date, certain goods and merchandise, to wit: (*here state the goods,*) of the said plaintiff, of the value of $, for commission and reward to the said defendant in that behalf; he, the said defendant, then promised the said plaintiff to endeavor to sell and dispose of the said goods and chattels on the terms and conditions aforesaid; yet the said defendant, on the day of , A. D. 18 , did sell and dispose of the said goods and merchandise of the said plaintiff for the sum of $, otherwise than for cash or an approved bill at a short date, but did sell and dispose of the same for a bad and insufficient bill of exchange, which hath be-

come and is of no value to the said plaintiff, so that the plaintiff hath lost the whole of the said sum of $, for which said goods and merchandise were so as aforesaid sold and disposed of by the said defendant, to the damage of the said plaintiff, as he avers, $.

Wherefore he prays judgment against the said defendant for the said sum of $, his damages so as aforesaid sustained.

NOTE.—The damages in such a case are the amount of the bad bill, with interest thereon, and should be stated high enough to meet the sum due at the trial.

107. FOR SELLING ON CREDIT, WHEN ORDERS WERE TO SELL FOR CASH.

The said A B, plaintiff, complains of the said C D, defendant, for that the said plaintiff, on the day of , A. D. 18 , delivered to the said defendant the following goods and chattels: (*here describe goods and chattels,*) as his agent and factor, to sell and dispose of the same for cash, and not otherwise, and the said defendant then received said goods and chattels, and promised the said plaintiff to sell and dispose of the same on the terms aforesaid; yet the said defendant afterward, to wit, on the day of , A. D. 18 , did sell and dispose of said goods and chattels upon credit, and otherwise than for cash, to one E F, for the sum of $, which said sum remains and is still unpaid to the said plaintiff, and the said E F has become and is wholly insolvent, and the said plaintiff is likely to lose the same, to the damage of the said plaintiff, as he avers, $.

Wherefore the said plaintiff prays judgment against the said defendant for the said sum of $, his damages so as aforesaid sustained.

XIV. *Against Wharfingers.*

108. FOR LOSING GOODS DELIVERED TO BE SHIPPED ON A PARTICULAR VESSEL, ETC.

The said A B, plaintiff, complains of the said C D, defendant, for that before and at the time of making the promise hereinafter stated, the said defendant was a wharfinger, and pursued the business of such wharfinger at , in the county of , and that thereupon, on the day of , A. D. 18 , in consideration that the said plaintiff, at the request of the said defendant, delivered to the said defendant, at and upon the said wharf, the follow-

ing goods and chattels, that is to say: (*here describe goods and chattels,*) of the said plaintiff, of the value of $, to be by the said defendant safely kept at and upon said wharf, and from thence to be shipped in and on board of a certain ship or vessel, (*if the vessel be named, say,* a certain ship called ,) for the purpose of being carried therein to , for reasonable wharfage and reward to the said defendant in that behalf; he, the said defendant, then promised the said plaintiff that he, the said defendant, would safely keep the said goods and chattels at and upon said wharf, and would ship the same in and on board of the said ship or vessel, in manner and for the purpose aforesaid; and the said defendant then received said goods and chattels for the purpose aforesaid, and might have shipped the same in and on board of said ship or vessel, in manner and for the purpose aforesaid; yet the said defendant did not, nor would, safely keep the said goods and chattels at and upon said wharf, nor ship the same in and on board of the said ship or vessel, in manner and for the purpose aforesaid; but, on the contrary thereof, he, the said defendant, so carelessly conducted himself in this behalf that, by and through the mere carelessness and negligence of the said defendant and his servants in that behalf, the said goods and chattels, of the value of $ aforesaid, became and were wholly lost to the said plaintiff, to the damage of the said plaintiff $.

Wherefore the said plaintiff prays judgment against the said defendant, for the said sum of $, his damages so as aforesaid sustained.

XV. *On By-Laws and Statutes.*

109. FOR KEEPING GUNPOWDER IN A CITY OR TOWN CONTRARY TO A BY-LAW.

The said town of , plaintiff, complains of the said C D, defendant, for that, heretofore, on the day of , A. D. 18 , a certain by-law before that time duly passed by the city council of said town, and published within the said town of , according to law, was in full force within said town of , as a by-law thereof; that by the said by-law it was provided that no person should keep within the corporate limits of said town any quantity of gunpowder exceeding one keg, unless a license for that purpose was first had and obtained from the city council; and it was further provided that any person who should violate the provisions of said by-law should pay a penalty not exceeding one hundred dollars;

and the said plaintiff further avers that the said defendant did, on the said day of , A. D. 18 , and for a long space of time before and after that date, keep in his warehouse, situate within the corporate limits of said town of , ten kegs of gunpowder without first having obtained a license therefor from the city council of said town of , contrary to the provisions of said by-law, and whereby the said defendant has become liable to pay to the said plaintiff the said sum of one hundred dollars; yet the said defendant, though often requested so to do, has not paid said sum of money, or any part thereof.

Wherefore the said plaintiff prays judgment against said defendant for said sum of $.

110. FOR KEEPING A GAMING HOUSE.

The said , plaintiff, complains of the said C D, defendant, for that, on the day of , A. D. 18 , there was in force in the said town of , a certain by-law of said town duly passed and published by the city council of said town, whereby it was provided that if any person should rent any house, store, or room, to any person whatever, to be kept and used for the purposes of gaming, then such person should forfeit and pay a penalty not exceeding one hundred dollars; and the said plaintiff avers that the said defendant did, on the said day of , A. D. 18 , rent to one E F, the under or cellar rooms of his storehouse, situate in said town, on the west side of street, between street and street, to be kept and used by the said E F for the purpose of permitting and carrying on therein gaming, contrary to the provisions of the by-laws aforesaid, whereby the said defendant has become liable to pay the said penalty of $.

Wherefore the said plaintiff prays judgment against the said defendant for the said sum of $.

These forms will serve as a sufficient guide in all similar cases; the averments must be the existence and terms of the by-law, and then, such averments as show a violation by the defendant, concluding with a prayer of judgment for the entire penalty. The same rule of declaring will apply to all cases where by statute a party is liable for any such penalty by reason of any neglect. The law need not be set out, but the petition must contain such facts as show that the defendant comes within the provisions of the law, and has incurred its penalty.

111. BY A SUPERVISOR AGAINST ONE FOR NEGLECTING TO WORK.

The said A B, supervisor of road district numbered , in the township of , in the county of , plaintiff, complains of C D, defendant, for that the said plaintiff, on the day of , A. D. 18 , was supervisor of said road district numbered , in said township of , in said county of , and that the said defendant was then a male person between the ages of twenty-one and fifty-five, and had resided over three months in this State, and was not a township charge, and did, on the said day of , A. D. 18 , reside in said road district numbered , in said township of , in said county of , and that the said plaintiff did, on the said day of , A. D. 18 , notify the said defendant to be and appear, with proper implements, on the day of next thereafter, at the dwelling house of , in said district, to work on the public highways in said district; yet the said defendant neglected and did not, nor would attend at the dwelling-house of the said , in said road district, to work on said public highway, but wholly neglected so to do, whereby he has incurred the penalty of $; yet the said defendant, though often requested, has not paid said sum, or any part thereof.

Wherefore the said plaintiff prays judgment against the said defendant for the said sum of $.

XVI. *On Judgments.*

112. ON A DOMESTIC JUDGMENT.

The said A B, plaintiff, complains of the said C D, defendant, for that the said plaintiff, at the term of the Court of Common Pleas, within and for the county of , did, by the consideration and judgment of said court, recover against the said C D, defendant, a judgment for the sum of $, his debt, and $, his costs in and about his suit in that behalf expended; which judgment still remains in that court in full force, unreversed and unsatisfied; yet the said defendant has not paid the said sum, or any part thereof, to the said plaintiff.

Wherefore the said plaintiff prays judgment against the said defendant for the said sums, amounting to $, with interest thereon from the day of , A. D. 18 .

113. ON JUDGMENT IN ANOTHER STATE.

The said A B, plaintiff, complains of the said C D, defendant, for that the said plaintiff did, on the day of , A. D. 18 , by

the consideration and judgment of a Supreme Judicial Court of the State of Massachusetts, begun and held at the court-house in Northampton, within and for the county of Hampshire, on the said day of , A. D. 18 , to recover against the said C D the sum of $, his debt, and $, his costs in and about his suit in that behalf expended; which said judgment still remains in that court in full force and effect, in no wise reversed or annulled; yet the said defendant, though often requested, has not paid said several sums of money, or either of them, or any part thereof, to the said plaintiff.

Wherefore the said plaintiff prays judgment against the said defendant for the said sums of money, amounting to the sum of $, together with interest thereon from the day of A. D. 18 .

XVII. *On Instruments under Seal.*

The code does not assume to change the legal character of contracts. They are still divided into contracts by parol or by deed; and deeds have the same legal effect as formerly. But in declaring on them, there is no necessity of further discriminating between them than to show the character of the contract. It is not to be supposed that a petition should not state whether the contract is or is not under seal; or, if no averment is made, then it must be held a parol contract, and can not be proved by one under seal. It is supposed that there is no necessity of making profert of a deed, as the party must now set forth in his petition all of the deed which can in any event be required to go on the record. He must set out not only his bond, but the condition, and then show such facts as entitle him to recover under that condition. In declaring, therefore, on bonds with a condition, it is necessary to set out the condition in the petition, and all the facts which are necessary to be shown, in order to entitle the plaintiff to a recovery. The practice, therefore, of declaring on the penal part of a bond no longer exists.

The forms which follow will merely serve as examples of the manner of declaring on deeds and contracts under seal.

114. ON MONEY BOND.

The said A B, plaintiff, complains of the said C D, defendant, for that the said defendant, on the day of , A. D. 18 , made his certain writing obligatory of that date, and then and there delivered the same to the said plaintiff, and thereby bound himself to pay to the said plaintiff the sum of $, in days

after date, which period has elapsed; yet the said defendant has not paid said sum of money, or any part thereof, to the said plaintiff.

Wherefore the said plaintiff prays judgment against the said defendant for the said sum of $, together with interest thereon from the day of , A. D. 18 .

These bonds being negotiable, the petition will, in all other respects, correspond with those on promissory note. The only change is in the description of the instrument, which must be called a writing obligatory, or a promissory note under seal, or be described by some other word or words that will show the character of the contract.

On Bonds with Condition.

115. ADMINISTRATOR'S BOND.

The said A B, one of the heirs at law and legal distributees of E F, deceased, plaintiff, complains of C D, L M, and N O, defendants, for that the said defendants, on the day of , A. D. 18 , at the county of aforesaid, by their certain writing obligatory of that date, acknowledged themselves to be held and firmly bound unto the said State of Ohio in the sum of $; which said writing obligatory was subject to a certain condition thereunder written, whereby it was provided that whereas, (*here copy the whole condition in words.*)

And the said plaintiff saith that afterward the said , administrator, entered upon the trusts of said administration, and a large amount of assets came to his hands to be administered, and that afterward, to wit, on the day of , A. D. 18 , the said C D settled in the Probate Court of said county his accounts of administration, and there was then found, by the consideration of said court, the sum of $, in the hands of the said C D, which the said C D was adjudged to pay over, according to law; and the said plaintiff further saith that he, the said A B, is one of the heirs of the said intestate, and as such entitled to receive from the said administrator the one-sixth part of the said sum of $, so found in his hands for distribution, to wit, the sum of $, and that afterward, to wit, on the day of , A. D. 18 , the said A B demanded of the said C D, the said sum of $, and requested him to pay to the said plaintiff the said sum; yet the said C D did not, nor would, pay the said sum of $, but hitherto hath wholly neglected so to do; whereby an action hath accrued to the said plaintiff on the said writing obligatory.

Wherefore the said plaintiff prays judgment against the said C D, L M, and N O, for the said sum of $, (*amount claimed,*) with interest thereon from the said day of , A. D. 18 .

NOTE.—Interest runs only from the date of the demand. The administrator is not in fault till demand is made. If the default consists in wasting the estate, or in not settling it, the breach must be assigned accordingly. These breaches may be assigned after setting forth the condition, the above form being followed to that point.

116. BREACH THAT HE HAS WASTED THE ESTATE.

And the said plaintiff saith that a large amount of assets came to the hands of the said administrator to be administered; and, among others, the following assets came to the hands of the said C D, to wit, (*here describe them,*) which assets the said C D afterward wasted and converted to his own use, and refused and neglected to return and account for in the schedule and accounts which he, the said C D, returned to the said Probate Court, and that, in his final settlement, the said C D was not charged with, nor did he account for the said goods and effects of the value of $.

By section 566 of the code, Swan's Stat. 696, the manner of suing on official bonds is wholly changed. The action must now be in the name of the party in interest, and not in the name of the State, the obligee of the bond. And any number of suits can be brought on the official bond until the judgments amount to the penalty.

117. ON SHERIFF'S BOND.

The said A B, plaintiff, complains of the said C D, E F, and G H, defendants, for that the said defendants, on the day of , A. D. 18 , at the county of , by their certain writing obligatory of that date, acknowledge themselves to be held and firmly bound unto the State of Ohio in the sum of $, and which said writing obligatory was and is subject to a condition thereunder written, and which condition is in the words following, that is to say: (*here set out the condition in its precise words and figures;*) and the plaintiff further saith that the C D did thereupon take upon himself the duties of the said office of sheriff of said county of , and assumed, and did act as such, at the time of the committing of the wrongs hereinafter stated; and the plaintiff further saith that the said A B did, at the term of the Court of Com-

mon Pleas, within and for the said county of , by the consideration of said court, recover a judgment against one L M for the sum of $, his debt, and $, his costs in said action expended; that the said A B afterward, on the day of , A. D. 18 , (*date of execution,*) caused an execution to be issued from said court on said judgment against the said L M, and directed to the sheriff of the said county of , commanding him that of the goods and chattels of the said L M, he cause to be made the said sum of $, debt, and $, costs, and $, accruing costs, and, for want of goods and chattels, he cause the same to be made of the lands and tenements of the said L M, and that he return said execution on the day of , A. D. 18 ; (*this whole averment must of course correspond with the language of the execution; the above is the mere substance of the writ as stated in the statute;*) and that the said execution did then come to the hands of the said C D, as such sheriff of the said county of , to be executed according to law; that afterward, to wit, on the day of , A. D. 18 , the said C D returned said writ of execution, with the following return indorsed thereon: (*here set out the return in its words,*) "Received this writ this day of A. D. 18 . I have made the money named in said writ, July 21, 18 ," (*date of return;*) and the said plaintiff further saith that afterward, on the day of , A. D. 18 , he, the said A B, requested the said C B to pay him the said sum of money so made on said writ of execution; but the said C D then neglected and refused to pay the same to the said A B; and the said plaintiff avers that neither the said C D, nor either of the other defendants have paid said sum of money, or any part thereof, to the said A B.

Wherefore the said plaintiff prays judgment against the said defendants for the said sum of $, (*the amount claimed,*) together with interest thereon from the said day of , A. D. 18 .

Interest in such a case will run from the time the demand is made. This form can be easily adapted to meet any kind of neglect, especially by consulting the forms of petition against sheriffs for neglect. The assignment of the breach must be substantially what a petition against the officer alone must be. And the same is true in regard to actions on all official bonds. Suit can first be instituted against the officer alone; and a recovery being had against him, an action can then be instituted on the bond, and the breach be assigned by setting forth the action and judgment against the officer and its non-payment: or an action may in the

first instance be brought on the bond, and then the default of the officer must be set out as a breach of the bond just as it must have been in an action directly against him alone.

118. LESSOR *v.* LESSEE FOR NOT PAYING FOR CERTAIN REPAIRS MADE BY LESSOR.

The said A B, plaintiff, complains of the said C D, defendant, for that, on the day of , A. D. 18 , (*date of lease,*) by a certain indenture then made between the plaintiff of the one part and the defendant of the other, sealed with the seal of said defendant, the said plaintiff, for the consideration therein mentioned, did demise, lease, and to farm let for the term of years, from and after the date of said indenture, unto the said defendant and his assigns, a certain dwelling-house and premises, with the appurtenances, as described in said indenture; and the said plaintiff further saith that the said defendant, by said indenture, among other things, covenanted that he, the said defendant, would pay the said plaintiff for all necessary repairs put upon the premises for the term aforesaid; and the said plaintiff further saith that the said defendant did not, nor would, after the said agreement and during the said demise, and while he was possessed of the said premises, with the appurtenances as aforesaid, pay or cause to be paid to the said plaintiff the repairs that became and were necessary to the said premises, and that were made upon the premises by the said plaintiff, after the making of the said indenture, and the said plaintiff avers that he expended $ in said repairs, of all which the said defendant had notice; yet the said defendant has not paid the same, to the damage of the said plaintiff $.

Wherefore he asks judgment for the said sum of $, his damages so as aforesaid sustained.

This breach is assigned as in the case of McGeehan *v.* McLaughlin, 1 Hall, 33. The court says: "Under the general rule the breach would be sufficiently assigned by negativing the words of the covenant, and the exception is of cases where such general assignment does not necessarily amount to an averment of a breach of the covenants, but further averments are necessary to show that the covenant has been broken; and in these cases the breach must be specially assigned. Now the covenant was to pay for all necessary repairs put upon the premises by the plaintiff; the breach assigned is that the defendant has not paid him for the repairs that became and were necessary, and were put upon the

premises by him. To sustain this general assignment, it will be incumbent on the plaintiff to show that repairs were necessary, and were put upon the premises by him; and to give a jury a measure of his damages, he must also show the amount of his expenditure in making them. But these are matters of evidence, to be shown at the trial in support of the action. They are not necessary to be superadded to the general assignment in pleading; and so far as any averment of them is requisite, it is in substance made in the general assignment itself, for the averment that the defendant did not and would not pay for the repairs that were necessary, and were made upon the premises by the plaintiff, is in substance an averment of the fact that repairs were necessary and were made. And if these facts are necessarily included in that general averment, a distinct and substantive averment of them could not be necessary." The same doctrine is recognized through all the cases. Randall *v.* C. & D. Canal Co., 1 Harr. 151; 3 Bibb, 330; Hard *v.* Trimble, 3 Marsh. 533; 14 Johns. 248; 11 Ib. 6.

Breach of a covenant of seizin may be assigned by negativing the words of the covenant, that the grantor has good right to convey; but the covenants for quiet enjoyment and of general warranty require the breach to show an eviction. Rechert *v.* Snyder, 9 Wend. 416; Marston *v.* Hobbs, 2 Mass. 433; 4 Ib. 408; Pollard *v.* Dwight, 4 Cranch. 421.

In Ohio, however, the court has held that no action can be maintained on a covenant of seizin, where the grantor was seized in fact, until an eviction, and hence the breach must set forth that fact. Robinson *v.* Neil, 3 Ohio, 525; King *v.* Kerr's Adm'r, 5 Ib. 154.

No more of the covenants need be stated than the one on which the action is brought. 1 Saund. 233, note 2; 2 Ib. 366, note 1.

119. ON COVENANT TO PAY RENT.

The said A B, plaintiff, complains of the said C D, defendant, for that, on the day of , A. D. 18 , by a certain indenture of that date, then made between the said plaintiff of the one part, and the said defendant of the other part, sealed with the seal of the said defendant, the said plaintiff did demise, lease, and to farm let unto the said defendant and his assigns a certain dwelling-house (or other building, or real estate, *as the fact is*,) and premises, with the appurtenances particularly described in said indenture, situate in , for the term of years next thereafter ensuing the date of said indenture, he, the said defendant, paying

therefor, to the said plaintiff and his assigns, the yearly rent of $, payable quarterly (or, semi-annually,) on the day of , in each and every year; and the said defendant did thereby covenant with the said plaintiff and his assigns to pay the said sum of $ yearly, and at the times before stated. By virtue of which demise the said defendant then entered into possession of the said dwelling-house and premises, and was possessed thereof for the term aforesaid; yet the said plaintiff saith that, after the making of said indenture of lease, and during the said term thereby granted, a large sum of money, to wit, the sum of $, of the rent aforesaid for of said term, ending on the day of , A. D. 18 , became and was due, and still is in arrears and unpaid to the said plaintiff; yet the said defendant, though often requested, hath not paid the same to the plaintiff.

Wherefore the said plaintiff prays judgment against the said defendant for the said sum of $, with interest thereon, from the day of , A. D. 18 .

120. ASSIGNMENT OF A TERM.

By virtue of which said demise, the said E F (*lessee*) afterward entered into and upon the said demised premises, and became and was thereof possessed for the term aforesaid. And the said E F, being so possessed, afterward, to wit, on the day of , A. D. 18 , by his deed of assignment, duly executed, for the consideration therein mentioned, did sell and assign unto the said plaintiff and his assigns all his right, title, and interest in and to the residue of the said term yet unexpired, named in said deed of demise; by virtue of which the said plaintiff then entered into the said demised premises, and was thereof possessed, and still is possessed for the residue of the said term yet unexpired.

121. SURRENDER OF A TERM.

And the said E F, (*lessee*,) being so possessed of the said tenements as aforesaid, he, the said E F, after the making of the said lease, and during the continuance of said term, thereby granted, on the day of , A. D. 18 , did surrender to the said the said term of years of him, the said E F, then to come and unexpired, of and in the said demised tenements, with the appurtenances, and all his estate, right, title, and interest, of and in the same; which said surrender he, the said , then accepted.

122. COVENANT TO PAY EXTRA INSURANCE.

The said A B, plaintiff, complains of the said C D, defendant, for that the said plaintiff, being, on the day of , A. D. 18 , possessed of certain real estate and buildings thereon, situate in , in said county of , did demise and lease the said premises to the said defendant for the term of years next thereafter ensuing, at a certain rent or price then agreed upon; and that the said defendant, in consideration thereof, then agreed with the said plaintiff to pay him any amount of extra insurance on the building on said premises caused from the said defendant's using the said premises for purposes different from that for which they were being used at the time of the making of said lease. And the said plaintiff saith that the said defendant, upon taking possession of the said premises under the said lease, converted a part of a building, before that time and at the execution and delivery of said lease used as a dwelling and private boarding-house, into a refreshment saloon and billiard-room, and rented the building before that time occupied as a private barn and stable into a public livery stable; whereby the rate of insurance on the said building standing on said leased premises was greatly enhanced; of which the said defendant then had notice; and the said plaintiff saith that he has been compelled to pay, and has paid, by reason of said changes in the use of the said premises, a large amount of extra insurance, to wit, the sum of $; and the plaintiff further saith that he notified the said defendant of the said extra rate of insurance, and, on the day of , A. D. 18 , requested him, the said defendant, to pay him, the said plaintiff, the said sum of $, so paid as extra insurance upon said premises; yet the said defendant did not, nor would he, pay to the said plaintiff the said sum of $; but so to do has wholly refused, to the damage of the said plaintiff $.

The said plaintiff therefore prays judgment against said defendant for the said sum of $, his damages so as aforesaid sustained.

A B,
By , his Attorney.

NOTE.—This form will be found substantially copied from the case of Edward *v.* Lent et al., 8 Pr. 28

123. ON DEED WITH COVENANTS OF GENERAL WARRANTY.

The said A B, plaintiff, complains of the said C D, defendant, for that the said defendant, on the day of , A. D. 18 , by his deed of that date duly executed, in consideration of $, by the said plaintiff then in hand paid to the said defendant, granted and conveyed to the said plaintiff and his heirs the following real estate, situate in the county of , and described as follows: (*here set out a description of the land conveyed,*) to have and to hold the aforegranted premises to the said plaintiff, his heirs and assigns, forever; and the said defendant by said deed covenanted to and with the said plaintiff that he, the said defendant, was seized in fee of said premises, that he had a good right to convey the same as aforesaid, that the said premises were free and clear of all incumbrances, and that he, the said defendant, would warrant and defend the said premises against the lawful claims of all persons whatsoever; and the said plaintiff in fact saith that the said premises were not free and clear of all incumbrances at the time the said deed of conveyance was executed and delivered by the said defendant to the said plaintiff; but on the contrary, that, on the said day of , A. D. 18 , one E F held a mortgage on the said premises, executed and delivered by the said defendant before the said day of , A. D. 18 , to the said E F, to secure the payment of the sum of $, with interest from and after the day of , A. D. 18 ; and the said plaintiff saith that, to remove said incumbrance, he, the said plaintiff, hath paid to the said E F the sum of $, on the day of , A. D. 18 , and then notified the said defendant thereof, and requested the said defendant to repay to the said plaintiff the said sum of $; yet the said defendant has not paid said sum of money, or any part thereof, to the said plaintiff.

Wherefore the said plaintiff prays, etc.

Where the action is on the covenant of seizin, the breach may be assigned by the negation of the words of the covenant, if the grantor was never in possession; but under our decisions, the averment may be required to be more particular; as that the said defendant was not in fact seized of said premises, but that one E F held and occupied the same adversely to the rights of the said defendant at the time of the delivery of said deed, whereby said plaintiff was prevented from obtaining possession and seizin in

fact of said premises. In such a case, the amount to be recovered would be the purchase money and interest from date of deed.

When the vendee was seized in fact, under his grantor, he can not sue until evicted. The petition in such a case must state the making of the deed and the covenants of warranty, and then aver that the said defendant was not seized in fee of said premises, and has not defended the same against the lawful claims of all persons; but the said plaintiff avers that one E F, at the time the said defendant made his said conveyance and covenant, was seized in fee of said premises; and that the said E F, on the day of , A. D. 18 , commenced an action in the Court of Common Pleas, for the county of , against the said plaintiff, to recover from him the possession of the said premises, and that such proceedings were had in said action, that afterward, at the term, A. D. 18 , the said E F recovered a judgment against the said plaintiff for the said premises, and that afterward, on the day of , A. D. 18 , the said plaintiff was evicted from the possession of the said premises under and by virtue of the aforesaid judgment; and so the said plaintiff avers that the said defendant has not kept his said covenant, but has broken the same, to the damage of the said plaintiff $.

The damages in this case will be the consideration paid and *four* years' interest. The statute of limitations cuts off any claim for mesne profits for a longer term than that, and hence interest is limited to that time. Backus *v.* McCoy, 3 Ohio, 211; 10 Ohio, 317.

Notice to a warrantor need not be given, and hence not averred, before a suit can be brought. King *v.* Kerr's Adm'r, 5 Ohio, 154.

When there has not been an eviction, something equivalent must be averred. In King *v.* Kerr's Adm'r, 5 Ohio, 154, an averment of an application for the benefit of the occupying claimant law, and the verdict, and of the amount paid to the plaintiff in ejectment, was held equivalent to an eviction. In Tuite *v.* Miller, 5 West. Law J. 413; 17 Ohio, 69, the court held that where dower had been assigned in the value of the one-third of the rents and profits, and made a charge on the land, this might well be considered equivalent to eviction. But where a gross sum was decreed for dower, and ordered to be enforced by execution, it was held not to be an eviction. The statute does not authorize such a decree for dower. Johnson *v.* Nyce's Ex'r, 17 Ohio, 66. The party must show that the dower has been assigned according to law; otherwise it can not be held to be equivalent to an eviction. Nyce's Ex'r *v.* Oberty, 17 Ohio, 71.

The averment of the breach in each of these cases must be special, setting forth the facts showing the eviction.

124. GRANTEE *v.* GRANTOR.

The said A B, plaintiff, complains of the said C D, defendant, for that the said defendant, on the day of , A. D. 18 , by his deed of that date, sealed with his seal and duly executed, attested, and acknowledged, in consideration of $, bargained, sold, and conveyed to the said plaintiff and his heirs certain lands, in the said deed particularly described, in fee simple; and the said defendant did, by said deed, covenant with the said plaintiff, his heirs and assigns, that he, the said defendant, would warrant and defend the said premises against the lawful claims of all persons whatever; and the said plaintiff saith that the said defendant did not, and would not, after the execution and delivery of said deed, warrant and defend said premises against the lawful claims of all persons whatever; but, on the contrary thereof, the said plaintiff avers that the said defendant had not then, at the execution of said deed, a good and sufficient title to the said premises; but that the freehold and paramount title in the said premises was then, and has continued to be, up to the ouster and dispossession hereinafter stated, in other persons; and by virtue of which said paramount title, the said plaintiff was afterward, on the day of , A. D. 18 , ousted and dispossessed of the said premises by due course of law, contrary to the said deed and covenant of the said defendant, and to the damage of the said plaintiff $.

Wherefore the said plaintiff prays judgment against the said defendant for the said sum of $, his damages so as aforesaid sustained.

NOTE.—It would seem as though this general form was sufficient in all cases; so held in 10 Wheat. 449; 6 Cowen, 122; 2 Saund. 181, n. 10.

125. ASSIGNEE *v.* GRANTOR.

(*The petition may be like the last, except using the name of the first grantor instead of the word "defendant" up to the statement of the deed and covenant; then proceed:*) And the said plaintiff further saith that the said E F (*first grantor*) afterward, on the day of , A. D. 18 , by his deed of that date duly executed, in consideration of $, sold and conveyed said premises to one L M, his heirs and assigns, and the said L M afterward, on the

day of , A. D. 18 , by his deed duly executed, in consideration of $, sold and conveyed said premises to the said plaintiff, his heirs and assigns forever. And the said plaintiff saith that, by virtue of said conveyance, he afterward entered into said premises, and was thereof possessed; and the said plaintiff further avers, (*state the breach as in last form, or specifically, like other forms, if deemed expedient.*)

126. HEIRS *v.* GRANTOR.

(*After stating the deed and covenant as in previous form, proceed as follows:*) And the said B M afterward entered into the said lands and tenements, and was thereof possessed in fee simple, and that the said B M, while so possessed, afterward departed this life, and that the said premises descended to the said plaintiffs as the heirs of the said B M; and that the said plaintiffs afterward entered into the said premises, and were thereof possessed as of an estate in fee simple, and continued so seized until afterward ousted and dispossessed as hereinafter stated. (*Here state the breach as before.*)

XVIII. *On Special Contracts.*

127. AGAINST ONE FOR NEGLECT IN GIVING NOTICE OF NON-PAYMENT OF BILL, ETC.

The said A B, plaintiff, complains of the said C D, defendant, for that the said plaintiff, on the day of , A. D. 18 , at , was the holder of a certain bill of exchange, drawn under date of , A. D. 18 , by one , and directed to one , of , thereby requesting the said to pay to one , or order, in days after date, $, at the bank of , in , and that the said bill of exchange was duly indorsed by the to the said plaintiff; and the said plaintiff further saith that, on the said day of , A. D. 18 , he, the said plaintiff, delivered to the said defendant the said bill of exchange for presentation to the said , for acceptance and payment; and the said defendant, for a valuable consideration, then promised the said plaintiff that he would diligently present, or cause to be presented, the said bill of exchange to the said , and procure the same to be accepted and paid by the said , unless such acceptance and payment should be refused; and in case of such non-acceptance and non-payment, or either, he, the said defendant, would give all necessary and proper notices to charge the said, (*drawer,*) as such drawer, and the said, (*indorser,*) as such indorser

of said bill of exchange; and the said plaintiff avers that the said did refuse to accept, or pay the said bill of exchange, and that the said defendant did not give, or cause to be given, to the said , and , the notices necessary to charge the said , as drawer, and the said , as indorser of the said bill of exchange, whereby the said plaintiff has lost the whole amount named in the said bill of exchange, to his damage $.

The said plaintiff therefore prays judgment against the said defendant for the said sum of $, his damages so as aforesaid sustained.

A B,
By , his Attorney.

This is taken from the case of Commercial Bank of Penn. *v.* Union Bank of N. Y., 1 Kernan, 203. The banker receiving a bill for collection is responsible for any neglect in making a demand and giving notices by which the holder is injured. Allen *v.* The Merchants' Bank, 22 Wend. 215; Montgomery County Bank *v.* The Albany City Bank, 3 Selden, 459; Fabens *v.* Mercantile Bank, 23 Pick. 330; Bank of Orleans *v.* Smith, 3 Hill, 560. So where the receiving bank remits the bill to its agent at the place of payment, the first bank is alone responsible to the holder, and the second bank to the first. Such is the doctrine in New York; but in Massachusetts, 23 Pick. 330, it is held that the bank receiving the note or bill and remitting it, is not liable for the neglect of the agent to whom it is remitted for collection. *Vide* also 4 Har. & Johns. 146; 6 Conn. 528.

128. ON CONTRACT TO EMPLOY ONE AS ATTORNEY.

The said A B, plaintiff, complains of the said C D, defendant, for that heretofore, to wit, on the day of , A. D. 18 , in consideration that the said plaintiff, at the request of the said defendant, had agreed to become the permanent attorney and solicitor of the said defendant, and to act as such for reasonable reward, to be therefor paid by the said defendant to the said plaintiff for his services in that behalf, he, the said defendant, promised the said plaintiff to retain and employ him as such permanent attorney and solicitor; and the said plaintiff saith that, after the making of the said agreement and in pursuance thereof, the said defendant did then in fact retain and employ the said plaintiff as such permanent attorney and solicitor as aforesaid; and the said plaintiff did then become, and was, and acted as the permanent attorney and solicitor of said defendant, and hath always from thence been ready and willing to continue to act as the permanent attorney and solicitor

of the said defendant; of which the said defendant had at all times notice; yet the said defendant, disregarding his said promise, did not, nor would permit or suffer the said plaintiff to continue to be the attorney and solicitor of the said defendant, or to act as such, but afterward, and before the commencement of this action, to wit, on the day of , A. D. 18 , without the consent of the said plaintiff and against his will, appointed certain other persons, to wit, , to be the attorneys and solicitors of the said defendant, and wrongfully, and without any just or reasonable cause for so doing, discharged the said plaintiff from being or acting as the attorney and solicitor of the said defendant, and deprived him of all gains and profits which could have arisen or accrued to the said plaintiff in that behalf, to the damage of the said plaintiff $.

The said plaintiff, therefore, demands judgment against the said defendant for the sum of $, his damages so as aforesaid sustained.

129. SPECIAL COUNT FOR SAME.

The said A B, plaintiff, complains of the said C D, defendant, for that, on the day of , A. D. 18 , it was agreed by and between the said plaintiff and the said defendant, that from the day of , A. D. 18 , then next, the plaintiff, as the attorney and solicitor of the said defendant should receive and accept a salary of $ per annum, in lieu of rendering an annual bill of costs for general business transacted by the plaintiff for the defendant, as such attorney and solicitor, and should, and would, for such salary of $ per annum, advise and act for the said defendant, (*the prosecuting or defending of suits, the preparation of bonds, or other securities for advances made by the said defendant and moneys disbursed by the plaintiff being accepted, and the plaintiff being allowed, in respect of such matters, to make the usual and regular charges of an attorney and solicitor,*) and that the plaintiff should attend the secretary of the said defendant, as well as the board of directors thereof, and the meetings of the proprietors thereof, when required; and the said agreement being so made, afterward, on the day of , in the year aforesaid in consideration that the plaintiff had at the request of the defendant, promised the said defendant to perform and fulfill the same in all things on his part, the said defendant promised the plaintiff to perform and fulfill the same in all things on his part, and to retain and employ the plaintiff as such attorney and solicitor of the defendant on the terms aforesaid; and although the said defendant did, for a certain small space of time thereafter,

to wit, for four months, in pursuance and fulfillment of said agreement and promise in that behalf, retain and employ the plaintiff as such attorney and solicitor on the terms aforesaid, and did pay him a small part of the said salary, to wit, $; and although the plaintiff was at all times, from the making of the said agreement hitherto, ready and willing to advise and act for said defendant, and accept the said salary on the terms aforesaid, and in all other respects to fulfill the said agreement on his part, of which the said defendant always had notice; yet the said defendant, disregarding his said agreement, did not, nor would continue to retain and employ the said plaintiff as such attorney or solicitor of the said defendant on the terms aforesaid, but, on the contrary thereof, afterward, to wit, on the day of , A. D. 18 , wrongfully and without any reasonable cause, dismissed and discharged the said plaintiff from such employment and retainer, and then, and from thence hitherto, has wholly refused to retain or employ him as such attorney and solicitor of the said defendant, or to pay him the salary aforesaid; by reason of which the said plaintiff has wholly lost and been deprived of the said salary of $, and also of divers gains which he might and otherwise would have derived from such employment in and about the prosecuting and defending of divers suits brought by and against the said defendant, and in preparing divers bonds, contracts, and securities for said defendant and otherwise, to the damage of the said plaintiff $.

The said plaintiff therefore prays judgment against the said defendant for the said sum of $, his damages so as aforesaid sustained.

These two counts are copied from the case of Emmons *v.* Elderton, representing the Church of England Life and Fire Assurance Trust and Annuity Company, 26 Eng. L. & Eq. 1. The special count was held good in the Exchequer Chamber, and also in the House of Lords, though the Court of Common Pleas had arrested the judgment on it. The ground of decision in the Common Pleas was that the promise to retain and employ was more comprehensive than the agreement first set forth. It is considered as settled law that a count of this nature is bad, if the promise is more extensive than the promise which is implied by law as arising from the past consideration. The agreement binds the company to continue the relation of employer and employed at least for a year. Per Compton, J. The words "retain" and "employ," as used in the present case, are a mere amplification of the preceding con-

tract of hiring and service. These words are used in the precedents continually as meaning hiring, engaging, and keeping a person in a service, and do not necessarily imply that the master is bound to supply the servant with any particular work whilst the relation subsists. Ib.; Fawcet *v.* Cash, 5 B. & Ad. 908. The term, it was agreed, makes the words of the agreement those of both parties; and where two parties agree that one shall accept and receive a yearly salary of $1,000 as attorney and solicitor of the other, and for a particular class of business, it is necessarily implied that the other shall pay it, and at the end of the year. It is not to be paid simply and at all events at the end of the year, but as a reward for the services of the other as an attorney and solicitor, for his attendance and advice when required, and being ready to give it whenever it should be asked, at all times during that year. Per Parke, B.: I feel quite satisfied that, in such a case as this, there is, upon a true construction of this agreement, an implied agreement upon the defendants below to retain the plaintiff, and to employ the plaintiff, in the sense in which I understand this word, for one year at least. Ib.; Beetson *v.* Collier, 4 Bing. 309; Gandall *v.* Pontigny, 1 Starkie, 198; Hartley *v.* Harman, 11 Ad. & El. 798; Hopkins *v.* Logan, 5 M. & W. 241; Kaye *v.* Dutton, 7 Man. & Gr. 807; Bainbridge *v.* Firmstone, 8 Ad. & El. 743; Thornton *v.* Jennings, 1 Man. & Gr. 166; Pilkington *v.* Scott, 15 M. & W. 657; Aspdin *v.* Austin, 5 Q. B. 671; Dunn *v.* Sayles, Ib. 685.

130. ON STOCK CALLS BY CORPORATION.

The said complains of the said C D, for that the said plaintiff is a corporation organized under the law of the State of , with a capital of $, divided into shares of $50 each, to construct and run a railroad from , in the county of , through the counties of , to , in the said county of ; and that, on the day of , A. D. 18 , the capital stock of said corporation had been all subscribed and taken according to law by divers persons; and, on the day of , A. D. 18 , the said C D had subscribed to and was then the owner of shares of the capital stock of said corporation; and that on said day of , A. D. 18 , the directors of said corporation duly made a call upon the stockholders of said corporation for the payment by each stockholder of the sum of on each share of said capital stock thereof, to be paid to , the treasurer of said corporation, at his office, in , on or before the day of , A. D. 18 , (*here, in same language, state all calls made up to the*

time and then payable,) of all which the said defendant had due and legal notice; yet the said C D, though often requested so to do, hath not paid said several sums of money, nor either of them, nor any part thereof, but hitherto hath wholly neglected and refused so to do.

Wherefore the said plaintiff prays judgment against said defendant for the said sum of $, (*amount of all calls sued for,*) with interest on $ from the day of , A. D. 18 , and on $ from the day of , A. D. 18 .

S N, Att'y for Plaintiff.

The subscriptions must be payable in money, and in nothing else. Henry *v.* Vermillion & Ashland R. R. Co., 17 Ohio, 187. It would seem that calls can not be made until the whole stock is subscribed, unless the charter provides otherwise. Redfield on Railroads, 79, No. 3; Stoneham Branch Railway Co. *v.* Gould, 2 Gray, 277; Salem Milldam Co. *v.* Ropes, 6 Pick. 23; S. C., 9 Ib. 187; Cabot & West Sp. Bridge Co. *v.* Chapin, 6 Cush. 50; War. & Nash. Railway Co. *v.* Hinds, 8 Cush. 110; Lex. & West Cam. Railway Co. *v.* Chandler, 13 Metcalf, 312; N. H. Central *v.* Johnson, 10 Foster, 390; J. & C. R. R. Co. *v.* Pratt, 40 Maine, 447; Penob. R. R. Co. *v.* Dummer, 40 Maine, 172; Same *v.* White, 20 Law, 689. If completed after suit, no action can be maintained. N. & L. Nav. Co. *v.* Theobold, 1 Moody & M. 151; Stratf. & M. R. R. Co. *v.* Stratton, 2 B. & Ad. 518; Atlantic Cotton Mills *v.* Abbott, 9 Cush. 423; Littleton Manuf. Co. *v.* Parker, 14 N. H. 543; Contoocook Valley Railway Co. *v.* Parker, 32 N. H. 363. There must be a strict compliance with all conditions precedent and the law, in order to enable a corporation to collect calls. The amount of capital stock should be given on the above authorities, and also it should be averred that all the stock was taken, as that fact is a condition precedent to the right to make calls. The reason of this must be apparent to every thinking mind. A railroad is projected; its capital is fixed at the amount which will be required to construct it. There will be no reason in making calls until the stock is subscribed, as the road can not otherwise be made. The ten per cent. required to be paid in on subscription, is required to be paid as a fund for preliminary expenses in obtaining subscriptions, making surveys, etc. Until, however, capital enough is obtained to construct the road, there is no need of calls. Indeed, each subscriber takes stock on the condition that the capital is to be subscribed, and so the making of the road secured. The same is true of a

manufacturing corporation. To make calls on a capital of $1,000,000, on a subscription of $200,000 of stock, is a mere waste of money, because the road can not be made with any such sum, and the money collected will only be wasted.

131. ON SPECIAL CONTRACT TO SELL.

The said A B, plaintiff, complains of said C D, defendant, for that the said defendant, on the day of , A. D. 18 , agreed with the plaintiff to buy of him, said plaintiff, and the plaintiff then agreed with the said defendant to sell to the said defendant certain goods, to wit, fifty tons of iron, at and for the price of £9 per ton, the said goods to be delivered forthwith by the said plaintiff to said defendant, at the works of the said , and the said price to be paid by said defendant to said plaintiff, in cash, in fourteen days from the time of the making of the said contract; and thereupon the said plaintiff promised said defendant to sell and deliver said iron as aforesaid, and the said defendant promised the said plaintiff to pay him for the said fifty tons at the rate and at the time aforesaid; yet the said plaintiff saith that, although the said period of fourteen days from the time of making said contract had elapsed before the commencement of this suit, and although the plaintiff has in all things performed and fulfilled the said contract on his part to be performed, yet the said defendant has not paid said sum of $, the price of said iron, nor any part thereof.

Wherefore the said plaintiff prays judgment for said sum of $, together with interest from the day of , A. D. 18 .

A B, Attorney for Plaintiff.

This form will be found in the report of the case of Staunton *v.* Wood, 7 Eng L. & Eq. 411. A plea was interposed that the iron had not yet been delivered; and the court held that the delivery was a condition precedent to the right to recover the price. It seems, therefore, that the general averment that the *plaintiff had in all things performed and fulfilled the said contract on his part to be performed*, was sufficient to include the averment of a delivery. An averment might be made that the iron had been delivered; but the plaintiff claimed a right to recover, if the money was not paid in the fifteen days, though the iron was not then delivered. The court rightly held that a delivery was a condition precedent to the right to be paid.

132. AGAINST RESIDUARY LEGATEE WHO HAS GIVEN BOND TO PAY DEBTS.

The said A B, plaintiff, complains of the said C D, E F, and G H, for that the said C D, as principal, and the said E F and G H, as his sureties, on the day of , A. D. 18 , made their certain undertaking of that date, and then and there delivered the same to the probate judge of said county, and thereby acknowledged themselves to be indebted to the State of Ohio in the sum of $, conditioned that, whereas one made his last will and testament, and thereby devised all the residue of his estate to the said C D, and appointed him executor of the same, which will has this day been admitted to probate, and said C D qualified as executor; now, if the said C D shall pay all and singular the debts and dues owing by the said intestate to any and all persons, and pay all legacies given in said will, then this undertaking shall be void, otherwise to be and remain in full virtue and force in law, which undertaking was duly delivered and accepted by said probate judge, and duly placed on file in his court;* and the said plaintiff saith that at the time of the death of said testator, he, the said testator, was indebted to the said plaintiff in the sum of $, for goods, before the death of said testator, sold and delivered to him in his lifetime at his request; which sum is now due and payable; yet neither the said testator in his lifetime, nor has the said C D since his decease, nor the said E F and G H, nor either, nor any of them, have paid said sum of money, nor any part thereof.

Wherefore the said plaintiff prays judgment against said defendants for said sum of $, with interest from the day of , A. D. 18 .

T W, Attorney for Plaintiff.

There need be no averment of demand of the party assuming to pay. Stevens *v.* Hartley, 13 Ohio St. 525. If the undertaking is under seal, it may be described as their writing obligatory, instead of undertaking.

If the debt is evidenced by note, the averments will be that the said testator made his certain promissory note in writing, and then delivered it to the plaintiff, or to some other person who indorsed it to plaintiff. In other words, the cause of action will be set out just as though the suit was against the testator himself.

The undertaking or bond under the statute is an absolute under-

taking to pay all the debts and legacies of said testator. He is not then required to return any inventory or settle any account with the Probate Court. His promise to pay, backed up by his sureties, is the means for the payment of debts; though creditors, not paid in case of insolvency of the parties to the undertaking, might, by a bill in chancery, subject any of the estate left undisposed of to the payments of debts and legacies.

This form is briefer than the one in the case above cited; but it is sufficient, because the bond or undertaking recites all the other essential facts. The giving of the undertaking, the existence of the debt due plaintiff, and its non-payment, are all the facts necessary to create the legal liability to pay. The undertaking or bond will be set out either in copying it or according to its legal effect. The form must be varied according to the words of the bond or undertaking.

On the construction to be given to this clause of our statute, we may consult the decision in Massachusetts and New Hampshire, from whose statutes this provision was borrowed, I think, in 1840. See Clarke *v.* Tufts, 5 Pick. 337; Thompson *v.* Brown, 16 Mass. 172; Stebbins *v.* Smith, 4 Pick. 97; Robinson *v.* Leavitt, 7 N. H. 73, 84. These cases show the meaning attached to this provision of allowing a residuary legatee to give a bond to pay debts and legacies. Parker, C. J., in Clark *v.* Tufts, says: "The legislature has made such bond a substitute for the estate of the deceased, so that there is no longer any lien upon the real or personal estate of the testator by his creditor, after the executors shall have conveyed the same to a *bona fide* purchaser. . . . By express provision of the statute, an executor so situated is not obliged to return any inventory, present any list of debts or claims, or settle any account."

The same form will answer for the non-payment of a legacy. Set out the bond or undertaking as in the above form down to the *, and proceed as follows:

FOR A LEGACY.

And the said plaintiff avers, that the said testator by his said last will and testament devised to the said plaintiff a legacy, to wit, the sum of $, and that since said will was admitted to probate, and said undertaking was made and delivered as aforesaid, more than one year has elapsed, and that said plaintiff did, on the day of , A. D. 18 , demand payment of said C D of said sum of $, the legacy so in said will given to said plaintiff; yet the said C D unjustly refused and neglected to pay the said legacy, or

any part thereof, and hitherto hath refused, and still does refuse and neglect, to pay the same, or any part thereof.

Wherefore the said plaintiff prays judgment against said defendants for said sum of $, together with interest from the day of , A. D. 18

The legacy bears interest at any rate from the end of one year from and after the granting of letters of administration. In a case of this kind, as the executor takes the use of the estate at once, I think he ought to pay interest from probate of the will. If this is not done, the executor puts in his own pocket the interest on all legacies, which is not reasonable, since the residue is given to him subject to their payment. The devise of the residue and the legacies take effect at the same instant of time, and the liability to pay arises at that instant.

133. ON SPECIAL CONTRACT TO PAY FREIGHT.

The said A B, plaintiff, complains of the said C D, defendant, for that on the day of , A. D. 18 , in consideration that plaintiff had received on board of a certain vessel (or steamboat, *as case may be.*) of the plaintiff, called the , then about to set sail on a certain voyage (or, about to start on, *if a river steamboat*) from the port of to the port of , certain goods and merchandise of defendant, to be conveyed in the said vessel (or, steamboat) on the said voyage, upon the terms that the defendant should, two months after the said vessel should have set sail on said voyage, pay to the said plaintiff in , (*the place where goods shipped, or any other place where it was to be paid,*) freight in advance, at the rate of $ per ton measurement for each ton of the said goods so received on board the said vessel, and also primage at the rate of per cent. on said freight, the defendant then promised said plaintiff to pay him in the said freight in advance, at the rate aforesaid and also said primage at the expiration of the said period of two months after the said vessel should set sail on said voyage; and the plaintiff saith that there was received on said vessel goods and merchandise of said defendant amounting to tons by measurement, the freight on which amounted to $, and the primage on which freight amounted to $, amounting in all to $, and that said vessel set sail from the said port of , on the day of , A. D. 18 , on her voyage aforesaid, and that more than two months had elapsed since the setting sail of said vessel as aforesaid before the commencement of this suit; yet the said defendant, disregard-

ing his said promise, has not paid said freight and primage, to wit, the said sum of $, nor any part thereof.

Wherefore the plaintiff prays judgment against said defendant for said sum of $, together with interest thereon from the day of , A. D. 18 .

W B L, Attorney for Plaintiff.

This is the declaration in the case of Tindall *v.* Taylor, 4 Ellis & Bl. 219; S. C., 82 Eng. C. L. 219. To this declaration the defendant plead that after the delivery, and before sailing, and after a reasonable time for her to have sailed, and a reasonable time before she did sail, he demanded said goods to be delivered back, and plaintiff refused. The plaintiff replied that after said goods were received and before notice to redeliver, the captain had signed bills of lading to deliver the goods to D at P, and defendant had sent forward one of the bills to D before the notice. The defendant rejoined that D was, and plaintiff knew he was, only the agent of defendant, and having no interest in the bills of lading. The plaintiff demurred to the rejoinder, and the court sustained said demurrer, holding that a person who has shipped goods on a general ship is not entitled at pleasure to demand them back without the payment of freight. Lord Campbell, C. J.: "We entirely agree to the law as laid down by Lord Tenterden in his treatise (8 ed. 595), and in Thomson *v.* Trail, 2 Car. & P. 334; S. C., 12 Eng. C. L. 153, when applied to a general ship, that 'a merchant, who has laden goods, can not insist on having them relanded and delivered to him without paying the freight that might become due for the carriage of them and indemnifying the master against the consequences of any bill of lading signed by him.' It is argued that there can be no lien on the goods for freight not yet earned or due; but when the goods were ladened to be carried on a particular voyage, there was a contract that the master should carry them in the ship upon that voyage for freight; and the general rule is, that a contract once made can not be dissolved except with the consent of both the contracting parties. . . . It would be most unjust to the owners and master of the ship, if we were to hold that upon a simple demand at any time the goods must be delivered back in the port of outfit; and the case of Thompson *v.* Small, 1 Com. B. 328; S. C., 50 Eng. C. L., the case relied upon by Mr. Willes, is no authority for such a doctrine." A general ship or vessel is one, which is employed by the master or owners, on a particular voyage, and is hired by a number of persons, unconnected with each other,

to convey their respective goods to the place of destination. 1 Bouv. L. D. 558. It will be seen by this definition that all our steamboats, with scarcely an exception, are what are called general ships, since they run particular voyages, and take from individuals whatever goods they respectively have to ship. Hence this decision applies to our river steamboats as much as to a sea-going vessel.

Lord Campbell continues: "After the master, at the request of the defendant, had signed bills of lading for the goods, making them deliverable to a consignee at the port of destination, one of which bills of lading he had transmitted to the consignee, it is quite clear that the defendant could have no right to the redelivery of the goods in the port of outfit on merely demanding them. The rejoinder alleges that the consignees were the agents of the defendant, and held the bill of lading only as such agents; but, as such agents, the consignees might have had authority to indorse the bill of lading to a purchaser of the goods, who, as assignee of the bill of lading for a valuable consideration, would have become proprietor of the goods, and entitled to demand them from the master." Andrew *v.* Moorhouse, 5 Taunt. 435; S. C., 1 Eng. C. L.; Saunders *v.* Drew, 3 B. & Ad. 445; S. C., 23 Eng. C. L.; Blakely *v.* Dixon, 2 B. & P. 321; Abbott on Shipping, 8 ed. 595; Thompson *v.* Dorning, 14 M. & W. 403; Hastier *v.* Conturier, 9 Exch. 102.

134. FOR DISMISSING A CORRESPONDENT CONTRARY TO AGREEMENT.

The said A B, plaintiff, complains of the said C D, defendant, for that on the day of , A. D. 18 , in consideration that the said plaintiff, at the request of said defendant, would enter into the employ of the defendant in the capacity of European correspondent of a certain periodical or newspaper called the New York Courier and Enquirer, for a certain time then understood and agreed upon between said plaintiff and said defendant, to wit, from the day and year aforesaid, until said service should be determined by due and customary notice in that behalf on either side, to wit, (*here state how service to be terminated,*) at and for a certain salary then agreed upon, to wit, (*here set out the salary per month or year,*) the defendant assumed and promised to retain plaintiff in said capacity, and to pay him the said salary so as aforesaid agreed upon, and to continue him in such service and employ until the same should be determined, as aforesaid provided for in that behalf; and the said plaintiff saith that he entered into and upon said service and employ, in the capacity and on the terms aforesaid, and was always ready and willing to continue therein

on the terms aforesaid; yet the said defendant, disregarding his said promise, did, on the day of , A. D. 18 , wrongfully discharge said plaintiff from said service and employ, without any previous notice, as aforesaid provided, and without any reasonable or probable cause therefor, whereby the plaintiff was thrown out of any employment for the space of , and lost great gains by reasons thereof, and was otherwise greatly injured; to his damage $.

Wherefore plaintiff prays judgment against said defendant for said sum of $, his damages so as aforesaid sustained.

S N, Attorney for Plaintiff.

This form is taken from the report of the case of Gould *v.* Webb, 4 Ellis & Bl. 933; S. C., 82 Eng. C. L. 933.

135. ON CONTRACT, WHERE BREACH OCCURS BEFORE DAY OF EXECUTION.

The said A B, plaintiff, complains of said C D, defendant, for that heretofore, to wit, on the day of , A. D. 18 , in consideration that the plaintiff, at the request of the said defendant, would agree with the defendant to enter into the service and employment of said defendant, in the capacity of a courier, on a certain day then to come, to wit, on the day of , A. D. 18 , and serve the said defendant in that capacity, and travel with him on the continent of Europe as a courier, for three months certain, from the day and year last aforesaid, and to be ready to start with the defendant on such travels on the day and year last aforesaid, at and for certain wages or salary, to wit, at and at the rate of $ for each and every month of such service, to be therefor paid by said defendant to the said plaintiff, the said defendant then agreed with said plaintiff, and then promised him that he, said defendant, would engage and employ said plaintiff in the capacity of a courier on and from the said day of , A. D. 18 , for three months from the day and year last aforesaid, and pay said plaintiff during the continuance of such service and employment for the same the said wages or salary of $ for each and every month of such service; and the plaintiff avers that he, confiding in the said agreement and promise of said defendant, did then, to wit, on the day and year last aforesaid, agree with said defendant to enter into the service and employment of said defendant in the capacity aforesaid, on the day of , A. D. 18 , and to serve said defendant in that capacity, and to travel with him on the con-

tinent of Europe as a courier, for three months certain, from the day and year last aforesaid, at and for the wages and salary last aforesaid; and that from the time of the making of the aforesaid agreement, and of the said promise of said defendant, until the time when the defendant wrongfully refused to perform and broke his said promise, and absolved, exonerated, and discharged the plaintiff from the performance of his agreement as hereinafter mentioned, he, the said plaintiff, was always ready and willing to enter into the service and employ of said defendant in the capacity aforesaid, on the day aforesaid, and to serve the defendant in that capacity, and to travel with him on the continent of Europe as a courier, for three months certain, from the day and year last aforesaid, and to start with said defendant on the day and year last aforesaid, at and for the wages and salary aforesaid; and the plaintiff, but for the breach by said defendant of his said promise as hereinafter mentioned, would, on the said day, have entered into the said service and employ of said defendant in the capacity, upon the terms, and for the time aforesaid; of all which said several promises the said defendant had notice and knowledge; yet the said defendant, not regarding the said agreement and promise, afterward and before the said day of , A. D. 18 , (*the day service to begin*,) wrongfully and wholly refused and declined to engage or employ said plaintiff in the capacity and for the purpose aforesaid, on or from the said day of , A. D. 18 , for three months, or on, from, or for any other time, or to start on such travels with the plaintiff on the day and year last aforesaid, or in any manner whatsoever to perform or fulfill his said promise, and then wrongfully wholly absolved, exonerated, and discharged the plaintiff from his said agreement, and from the performance of said agreement on his, the plaintiff's, part, and from being ready and willing to perform the same on his, the plaintiff's, part, and that said defendant then wrongfully broke, put an end to, and determined his said promise and engagement, whereby an action hath accrued to the plaintiff; to his damage $.

Wherefore plaintiff demands judgment against said defendant for said sum of $, his damages so sustained.

E T H, Attorney for Plaintiff.

The above is a copy of the declaration in the case of Hachster *v.* De la Tour, 20 Eng. L. & Eq. 157; S. C., 2 E. & B. 678. There are probably some unnecessary averments; the main averments are: 1. The offer of plaintiff; 2. The terms of that offer; 3. The

acceptance of the offer by plaintiff in the terms of the offer; 4. The readiness of plaintiff to enter upon the service at the time fixed, and the renunciation by defendant of the agreement communicated to plaintiff, and the date of it. The court held he could maintain an action at once for a breach of the contract. The cases are cited in the note to the next form. The principle is that if one disables himself for performing a contract to be executed at a future day he can be sued at once; and that the renunciation of a contract communicated to the other party will have the same effect. This form will enable the pleader to form one to suit any kind of an agreement.

136. ON A PROMISE TO MARRY, ON A REFUSAL BEFORE DAY AGREED.

The said A B, plaintiff, complains of the said C D, defendant, for that heretofore, to wit, on the day of , A. D. 18 , in consideration that the said plaintiff, being then sole and unmarried, at the quest of the said defendant, had then promised the said defendant to marry him, the said defendant, at the time hereinafter stated, the said defendant then promised said plaintiff to marry her, the said plaintiff, on the death of E F, the father of said defendant; and the plaintiff avers that, relying on said promise of said defendant, she has always from thence hitherto and still remains sole and unmarried, and is still ready and willing to marry said defendant on the death of the said E F, whereof the said defendant had always had notice; yet the said defendant, not regarding his said promise, afterward, to wit, on the day of , A. D. 18 , announced to the said plaintiff his intention and determination not to marry said plaintiff on the death of the said E F, his father aforesaid, and of not fulfilling his said promise to said plaintiff, and wholly broke off said engagement and wholly abandoned the society of said plaintiff, whereupon the plaintiff, as she lawfully might, notified said defendant that she elected to treat said promise as terminated, and said engagement broken off and abandoned by said defendant, whereupon she sues without waiting for the death of said C F; all to the damage of plaintiff $.

Wherefore plaintiff prays judgment against said defendant for said sum of $, her damages as aforesaid sustained.

D B H, Attorney for Plaintiff.

The case on which this petition is framed is reported in L. R., 5 Exch. 322; 7 Exch. 111, Trost *v.* Knight. The court of exchequer chamber held that the action would lie, while the court of ex-

chequer had decided the other way. The court held that where a party had abandoned a contract and refused to execute, the other party might sue at once, and was not bound to wait until the time for its execution had expired. Cockburn, C. J.: "The cases of Lovelock *v.* Franklyn, 8 Q. B. 371, and Short *v.* Stone, 8 Q. B. 358, which latter case was an action for breach of promise of marriage, had established that where a party bound to the performance of a contract at a future time puts it out of his own power to fulfill it, an action will at once lie. The case of Hachster *v.* De la Tour, 2 E. & B. 678; S. C., 20 Eng. L. & Eq. 157, upheld in this court in the Danube and Black Sea Co. *v.* Xenos, 13 C. B., N. S. 825, went further, and established that notice of an intended breach of a contract, to be performed *in futuro*, had a like effect.

"The law with reference to a contract to be performed at a future time, where the party bound to the performance announces prior to the time his intention not to perform it, as established by the cases of Hachster *v.* De la Tour, 2 E. & B. 678, and the Danube and Black Sea Co. *v.* Xenos, 18 C. B., N. S. 825, on the one hand; and Avery *v.* Bowden, 5 E. & B. 714; Reid *v.* Hoskins, 6 E. & B. 953; and Barwick *v.* Buba, 2 C. B., N. S. 563, on the other,—may be thus stated: The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance; but in that case he keeps the contract alive for the benefit of the other party as well as his own: he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstances which would justify him in declining to complete it.

"On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other as a wrongful putting an end to the contract, and may at once bring his action, as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating the loss. After full consideration we are of the opinion that, notwithstanding the distinguishing circumstances to which we have referred, this case falls within the principle of Hachster *v.* De la

Tour, 3 E. & B. 678, and that consequently the present action will lie."

The distinguishing circumstance referred to by the judge was that, in the case of Hachster *v.* De la Tour, the promise was to execute the contract at a fixed time, and here the time was indefinite, to wit, on the death of the father. Philpotts *v.* Evans, 5 M. & W. 475; Ripley *v.* McClure, 4 Exch. 359; Wilkinson *v.* Verity, L. R., 6 C. P. 206; Burtis *v.* Thompson, 42 N. Y. 246. In this last case, it was held that where the parties having entered into an engagement to marry "in the fall," the defendant announced to the plaintiff in October that he would not perform the contract, an action might be commenced immediately; and that an action for the breach of a promise will lie at once upon a positive refusal to perform a contract of marriage, although the time specified for the performance had not arrived.

In Short *v.* Stone, it was held that a man who had promised to marry a woman on a future day, and before the day arrives, marries another, is instantly liable for an action for the breach of promise of marriage.

137. ACTION ON COVENANT NOT TO KEEP A PUBLIC-HOUSE WITHIN A CERTAIN DISTANCE OF ANOTHER.

The said A B, plaintiff, complains of the said C D, defendant, for that before and at the time of making the contract hereinafter stated, the said C D was possessed of certain premises with buildings thereon and used by said defendant as a public-house, known and called the , situate at , in the county of ; and being so possessed and wishing to dispose of the same, the said defendant did, on the day of , A. D. 18 , agree with the said plaintiff to sell him the said public-house with the good-will and appurtenances thereunto belonging, for the sum of $, and further agreed not to keep and carry on a public-house within miles of the place so agreed to be sold, and the said plaintiff agreed with said defendant to buy said public-house for the price and covenant aforesaid; and the said defendant did sell and convey said premises as aforesaid to said plaintiff, and did then and there enter into a covenant in writing with said plaintiff, whereby said defendant did then covenant to and with said plaintiff that he would not thereafter keep or carry on a public-house within miles of said premises, and that if he did so do, he would pay the plaintiff the sum of $, as liquidated damages for such breach of said covenant and the plaintiff says that he

accepted said conveyance and said written covenant, and did then pay (or. secure to be paid) to the said defendant the said sum of $; yet the said defendant, not regarding his said covenant, did afterward, to wit, on the day of , A. D. 18 , keep and carry on a public-house contrary to the terms of said covenant, at , in said county of and within miles of said public-house so sold by said defendant to said plaintiff as aforesaid, whereby an action has accrued to have and demand from the said defendant the said sum of $, so agreed to be paid as liquidated damages for a breach of said covenant.

Wherefore plaintiff demands judgment against said defendant for said sum of $

S N, Attorney for Defendant.

This is drawn on the case of Mouflet *v.* Cole, L. R., 7 Exch. 70; S. C., 1 Eng. 177. The only question there presented was how the distance named in the covenant was to be measured. The covenant was not to keep a public-house within one-half mile of the one sold. The court held it was to be measured as the crow flies, that is, by a straight line from the one house to the other. Wing *v.* Earle, Cro. Eliz. 212; Woods *v.* Dennett, 2 Starkie N. P. 89; Leigh *v.* Hind, 9 B. & C. 774; Regina *v.* Inhabitants of Saffron Waldon, 9 Q. B. 76; Stokes *v.* Grissell, 14 C. B. 678; Lake *v.* Buller, 6 E. & B. 92; Jewel *v.* Stead, 6 E. & B. 350; Duigman *v.* Walker, 28 L. J. Ch. 867; Atkins *v.* Kinoir, 4 Exch. 776. When the course of a deed is from one point to another, it calls for a straight line. Jenks *v.* Morgan, 6 Gray, 448; Allen *v.* Kingsbury, 16 Pick. 235.

138. COMMON COUNT WITH ASSIGNMENT.

A B complains of said C D, for that C D, heretofore, to wit, on the day of , A. D. 18 , was indebted to one E F, in the sum of dollars and cents for work, labor, and services and material furnished (or, for money before that time had and received by said defendant to and for the use of one E F, or for so much money before that time paid, laid out, and expended by one E F, to and for the use of said defendant and at his special instance and request,) to and for the use of said defendant and at his special instance and request; and that afterward the said E F, for a valuable consideration, assigned and transferred the said claim and the money due thereon to the said plaintiff, of all which said defendant had notice; and the plaintiff avers that said sum of money

is now due and payable, and yet said defendant, though often requested to pay the same, has hitherto and does still neglect and refuse to pay said sum of money or any part thereof to said plaintiff.

Wherefore said plaintiff demands judgment against said defendant for said sum of $, together with interest thereon from the day of , A. D. 18 .

S N, Attorney for Plaintiff.

139. ON WARRANTY THAT DEFENDANT HAD RIGHT TO PERMIT PLAINTIFF TO PUBLISH A WORK.

The said A B, plaintiff, complains of the said C D, defendant, for that the said plaintiff was the proprietor of a certain literary periodical called "The Parlor Library," and was desirous of publishing therein a certain work of which one E F, deceased, was the author; and that the said defendant did, on the day of , A. D. 18 , represent that he was the son and executor of said E F, and had the right and authority to grant to the plaintiff a legal license to so publish the said work, (*here state the title of it,*) in his said periodical; and that the said defendant on the said day of , A. D. 18 , in consideration that the said plaintiff would pay to the said defendant the sum of $ for the license and permission to publish the said work, called (*here set out name,*) in said literary periodical, promised the said plaintiff that he, said defendant, then had sufficient right, title, and authority at law and in equity, to sell and grant such license and permission; and the said plaintiff avers that he did then pay to the said defendant the said sum of $ on the consideration and for the purpose aforesaid; but the said plaintiff avers that said defendant broke his said promise in this, that, at the time of the making of said promise and contract, the said defendant had no such right, title, or authority to grant and sell said license and authority to publish said work as aforesaid; but that, on the contrary, at the time of the making of such promise and contract, one was equitably the proprietor and owner of the copyright of said work, and had the sole and exclusive right, title, and authority to grant such license and permission to publish said work as aforesaid; whereby the said plaintiff was put to great expense, and compelled to pay a large sum of money for publishing said work in said periodical to the said , and other injuries sustained by said plaintiff; to his damage $.

The plaintiff, therefore, prays judgment against said defendant for the said sum of $, his damages so as aforesaid sustained.

S N, Attorney for Plaintiff.

This is the declaration in the case of Simms and others *v.* Marryatt, 7 Eng. L. & Eq. 330. The question of warranty is elaborately discussed. The court held on the evidence there was an express warranty. Lord Campbell, C. J., said: "I am clearly of opinion that the plaintiffs are entitled to our judgment. It does not seem necessary to inquire what is the general law as to implied warranty of title on the sales of personal property, which is not quite satisfactorily settled. According to Marley *v.* Attenborough, 3 Exch. 500, if a pawnbroker sells unredeemed pledges he does not warrant the title of the pawner, but merely undertakes that the time for redeeming the pledges has expired, and he sells only such right as belongs to the pawner." As to implied warranty, see Hibblewhite *v.* McMorine, 6 M. & W. 200; Show *v.* Rowley, 16 Ib. 810; Stephens *v.* De Medina, 4 Q. B. 422.

140. ON SECOND TRIAL UNDERTAKING.

The said A B complains of the said C D, E F, and G H for that, on the day of , A. D. 18 , the said C D as principal, and the said E F and G H as his sureties, made and delivered their certain undertaking in the words and figures following, that is to say: Whereas C D did enter a notice at the term of the Court of Common Pleas, within and for the county of , of a certain demand for a second trial in an action wherein the said A B was and one was , and in which action a judgment had then and there been rendered against the said C D; and whereas the said court did then and there fix the amount of the undertaking in the sum of $.

Now we, the said C D as principal, and the said E F and G H as sureties, do undertake and agree with the said , in the sum of $, that the said A B shall abide and perform the order and judgment of the court, and pay all moneys, costs, and damages which may be required of, or awarded against, the said C D consequent upon said second trial; and the said plaintiff saith, that on said second trial in said action, such proceedings were had therein that, at the term, A. D. 18 , of said court, the said recovered, by the consideration of said court, a judgment against the said C D for the sum of $ debt, (or, damages,) and also his costs in and about his suit in that behalf expended, taxed to $, and that afterward, to wit, on the day of , A. D. 18 , the said caused an execution to be issued to the sheriff of said county on said judgment, which execution was duly returned by said sheriff indorsed, "No goods or chattels, lands or tenements

of said A B found in my county whereon to levy," of all which said defendants had notice; yet the said saith that neither the said C D, nor the said E F or G H, or either of them, have paid said sums of $ and $, his debt (or, damages,) and costs aforesaid, nor any part thereof, whereby a right of action hath accrued by law to said plaintiff, to have and demand of said defendants the said sum of $, his debt (or, damages,) aforesaid, and the sum of $, his costs so as aforesaid, taxed in said action against said C D, and in favor of said plaintiff.

Wherefore the said plaintiff prays judgment against said defendant for said sum of $, with interest from the day of , A. D. 18 ; and also for the sum of $, his costs aforesaid, with interest from day of , A. D. 18 .

THOS. T, Attorney for Plaintiff

The above is founded on the form contained in this work. Of course the undertaking must be set out as it is. If it is a sealed instrument, with a condition attached to it, it must be so set out. It is unnecessary further to refer to the suit than it is referred to in the bond or undertaking. It is well to put in the averment as to the issue of an execution, as some of the statutes require the execution to issue before a suit can be prosecuted on the undertaking for a second trial. If there is no such provision, that averment is unnecessary. If it is in, it need not be proved, unless the issue of the execution is made a condition precedent to the right to sue. The undertaking, by its terms, is a positive promise to pay if the principal does not. There are no authorities required in support of these plain propositions.

141. ON AN APPEAL BOND.

The said A B, plaintiff, complains of the said C D, E F, and G H, defendants, for that heretofore, to wit, on the day of , A. D. 18 , the said C D as principal, and the said E F and G H as sureties, acknowledged themselves to be held and firmly bound unto A B in the penal sum of $, to the payment of which, well and truly to be made, the said defendants did thereby jointly and severally bind themselves, their heirs, executors, and administrators—sealed with their seals, and dated the day and year aforesaid; under which was written the condition following, that is to say: The condition of the above obligation is such, that whereas the said C D has taken an appeal from a certain judgment rendered against him, and in favor of A B, in the Court of Com-

mon Pleas within and for the county of , at the term, A. D. 18 , of said court, for the sum of $, (or, for the specific performance of a real contract,) and $, costs of suit, to the District Court within and for said county of . Now, if the said C D shall abide and perform the order and judgment of the said District Court, and shall pay all moneys, costs, and damages which may be required of, or awarded against, the said E F by the said court, then this obligation shall be void: otherwise it shall remain in full force and virtue in law; and the said plaintiff saith that, afterward, such proceedings were had on said appeal in said district court, that, at its term, A. D. 18 , the said A B recovered a judgment against the said C D for the sum of $, and his costs taxed to $; and the said plaintiff further states that, afterward, to wit, on the day of , A. D. 18 , he caused an execution to be issued on said judgment, directed to the sheriff of said county, for the collection of said sums of money, and that said sheriff returned said execution indorsed, "No goods or chattels, lands or tenements of said C D found in my county whereon to levy;" and plaintiff saith that neither of said defendants have paid said several sums of money so awarded against the said C D, nor any part thereof, whereby an action hath accrued to the said plaintiff to have and demand said sum of $ from said defendants.

The plaintiff, therefore, prays judgment against said defendants for said sum of $, with interest from the day of , A. D. 18 .

H W, Attorney for Plaintiff.

This form is prepared for the bond given in this work. If an undertaking, and not a formal bond is given, the petition must contain a statement of a copy, or the legal effect of it, in lieu of the bond set out here; otherwise, the other parts of the petition will be like the above. There are now in Ohio no appeals save in chancery cases; in actions at law a second trial is allowed instead of an appeal. What I have said as to a second trial undertaking is applicable to an appeal bond, or undertaking.

142. AGAINST RAILROAD COMPANY ON SPECIAL AGREEMENT.

The said A B complains of the said C D, a corporation organized under the laws of Ohio, for that the said defendant heretofore, to wit, on the day of , 18 , at said county, in consideration that the said plaintiff would prepare a report and maps

showing the mineral resources to be found along the line of the contemplated railroad of said defendant, assumed and promised the plaintiff to pay him what the preparing and making of said reports and maps should be reasonably worth; and the plaintiff avers that relying on said promise of said defendant, he did thereupon proceed to make the necessary examination and survey of the country along the line of said contemplated railroad to ascertain the location, character, and quantity of mineral substances that might there be found and made available for extracting the same, and did after such examination and survey, prepare in writing a report stating the result of such examination and survey, and the location, character, and quantities of said minerals, with certain maps to illustrate to the eye the information and statements contained in said written report; and did then deliver said report and maps to the said defendant, and that said defendant accepted the same and caused it to be printed and distributed to divers persons as showing the value of said line of railroad when completed, and thereby inducing capitalists to become interested therein; and the said plaintiff further avers that said labor, services, and time spent in the preparation and making of said report and maps, was reasonably worth two thousand dollars, of all which said defendant had notice; yet the said defendant, though often requested, has not paid said sum of dollars, nor any part thereof.

Wherefore the plaintiff demands judgment against said defendant for $, together with interest from the day of , A. D. 18 .

J W, Attorney for Plaintiff.

143. ON SPECIAL AGREEMENT TO DELIVER SHEEP

The said A B, plaintiff, complains of the said C D, defendant, for that the said plaintiff heretofore, to wit, on the day of , A. D. 18 , agreed with the said defendant that he, said plaintiff, should deliver to and put into the possession of said defendant two sheep, the property of said plaintiff, and that said defendant was to have and keep said sheep so to be delivered, from that day, to wit, from the day of , A. D. 18 , until the day of , A. D. 18 ; and that said defendant, in consideration thereof, assumed and promised the said plaintiff that he, said defendant, would on the expiration of the said term of four years, to wit, on the day of , A. D. 18 , return and deliver to the said plaintiff four good and healthy sheep; and the said plaintiff saith that, in compliance with said agreement on his part, he did, on said day of , A. D. 18 , deliver to and put into the possession

of said defendant, and said defendant did then and there receive and accept from said plaintiff, two sheep, in accordance with said agreement; yet the said defendant, though said term of years has expired and terminated, has not hitherto returned and delivered to the said plaintiff four good and healthy sheep as by his said promise he was bound to do, but, on the contrary, hitherto hath neglected and refused, and still does neglect and refuse, to return and deliver said four good and healthy sheep to the plaintiff; to his damage $.

Wherefore said plaintiff prays judgment against said defendant for said sum of $, his damages so as aforesaid sustained.

L P, Attorney for Plaintiff.

144. ON COUPONS SEPARATE FROM THE BONDS.

The said A B, plaintiff, complains of the said , a corporation duly organized under a law of the State of , for that, on the day of , A. D. 18 , the said defendant, by its writing obligatory of that date, acknowledged itself to be indebted in the sum of $, for money before that time borrowed, to one E F , to be paid to , or bearer, on the day of , A. D. 18 , with interest at the rate of per cent. per annum, payable half yearly on the first day of and the first day of in each year, at the office of said defendant, in , in the county of and State of , on delivery of the warrant therefor annexed to said writing obligatory; and that at the date of said writing obligatory there was annexed thereto an interest warrant for the sum of $, being the half yearly interest on said writing obligatory, numbered , payable on the first day of , A. D. 18 , at the office of said defendant, in said city of , on delivery of said interest warrant; that on the day of , A. D. 18 , one became and was the holder and bearer of said writing obligatory, and of the said interest warrant thereto then annexed, and that whilst the said was such holder and bearer of said writing obligatory, the said did, to wit, on the day of , A. D. 18 , detach the said interest warrant from the said writing obligatory, and, as the owner, holder, and bearer of said interest warrant, did, on the day of , A. D. 18 , sell, transfer, and deliver for a valuable consideration, the said interest warrant to the said plaintiff, who thereafter and still is the owner, holder, and bearer of said interest warrant; and that afterward, to wit, on the day of , A. D. 18 , the said plaintiff being then such owner, holder, and bearer of said interest warrant, did present said interest warrant to , the treasurer of said de-

fendant, at its office in said city of , and demanded payment thereof, and that the said , treasurer as aforesaid, did then and there refuse to pay, whereby an action hath accrued to the said plaintiff to recover of said defendant the said sum of $, named in said interest warrant.

Wherefore the said plaintiff prays judgment against the said defendant for the said several sums, to wit, for the sum of $, with interest on $ from the first day of , A. D. 18 , etc. (*on each coupon.*)

N L, Attorney for Plaintiff.

This is substantially the form found in the case of National Exchange Bank *v.* Hartford, Providence & Fiskill R. R. Co., 8 R. I. 375; S. C., 5 Am. 582. The court holds that these coupon bonds are negotiable, and also the interest coupons attached to them; and that these interest coupons or warrants may be separated at any time from the bond and transferred by delivery, or sued on by the party detaching them from the bond and after the bond has been paid.

Durfee, J.: "We think it settled by the current of American authority that a coupon bond, like those set forth in the plaintiff's declaration, is negotiable, and that its coupons are also negotiable, and may be detached and negotiated by simple delivery, and sued on separately from the bond. The Supreme Court of the United States, in White *v.* The Vermont & Massachusetts R. R. Co., 21 How. 575, 577, held that such bonds were negotiable, basing their opinion on the intent to give them a negotiable character, as shown in the form in which they are issued and put in circulation, and on the usage and practice of business men dealing in them, as well as the decisions of the court." See, to same effect, County of Beaver *v.* Armstrong, 44 Penn. 63; Comm'rs of Knox Co. *v.* Aspinwall, 21 How. U. S. 539, 546; Thompson *v.* Lee County, 3 Wall. 327. In this last case, the court say: "It is not necessary that the holder of the coupons, in order to recover them, should own the bonds from which they are detached. The coupons are drawn so that they can can be separated from the bonds, and, like the bonds, are negotiable, and the owner of them can sue without the production of the bonds to which they are attached, or without being interested in them." *Vide* also 32 Vt. 397; 1 Stockton Ch. 667, 698–700; 8 Gray, 595; 27 Penn. 413, 418; 3 Kernan, 599; 3 McLean, 472; Redfield on Railways, 596, sec. 239; 1 Parsons on Contracts, 290, 291.

Each coupon is a separate contract; hence there must be a separate count for each coupon, whether detached from the same or different bonds.

PETITIONS IN TORT.

145. FOR KEEPING A VICIOUS DOG.

County, ss., Court of Common Pleas.

A B, plaintiff, *vs.* C D, defendant. } Petition.

The said A B, plaintiff, complains of the said C D, defendant, for that heretofore, to wit, on the day of , A. D. 18 , (*the exact time is not material,*) and from thence and until and at the time of the injury to the said plaintiff as hereinafter mentioned, the said defendant wrongfully and injuriously did keep a certain dog; he, the said defendant, during all that time knowing that the said dog then was used to bite and attack mankind; and which said dog did afterward, and whilst so kept by the said defendant as aforesaid, to wit, on the day of , A. D. 18 , (*near the time,*) attack and bite said plaintiff, and greatly lacerate and wound him, the said plaintiff, in his right leg, (or, arm, *as case may be,*) and thereby he, the said plaintiff, became sick, sore, and lame for a long space of time, to wit, for the space of six months thence next following, during all of which time the said plaintiff was prevented by said wounding from attending to his usual business and lawful affairs; and was put to great expense, to wit, to the sum of $, in endeavoring to be cured of the said wounds and lameness so as aforesaid occasioned; to the damage of the plaintiff $.

Wherefore the said plaintiff prays judgment against the said defendant for the said sum of $, his damage so as aforesaid sustained.

Chitty advises counts averring that the dog was of a *ferocious* and *mischievous nature*, and also *for not keeping the dog properly secured or fed*, as the facts may be. 2 Chitty's Pl. 597. The former is only equivalent to the averment that the dog was accustomed to bite; and yet the cases of Jones *v.* Perry, 2 Esp. 482, and Cockerham *v.* Nixon, 11 Iredell, 269, seem to make a distinction. In these cases it seems to be supposed that a dog of such a disposition ought to be kept up, even though it can not be proved that he had bitten any one. So, in a note of Pickering *v.* Orange, 1 Scam. 492, 1 U. S. Dig. 590, sec. 7, it is said that where a person keeps a dog or

other animal, which is known to him to be of a savage and ferocious disposition, he is accountable for all the injury it may do to other animals. Yet it would seem that such dog must have done mischief; otherwise the owner will not be liable. The ferocious character of the dog can only be evidenced by his acts. There are three necessary averments: First, that the dog would bite men; secondly, that the owner knew it; thirdly, that he did bite the plaintiff. When all this is proved, it matters not how carefully the dog was kept; the owner has no right to keep such a dog at all. McCaskill *v.* Elliott, 5 Strobh. 196.

The *scienter* must be alleged and proved. 1 M. & S. 238; 2 Salk. 662; 2 Strange, 1264; Vrooman *v.* Sawyer, 13 Term, 339; 2 Esp. 482; 4 Camp. 198; 1 Starkie, 285; 3 C. & P. 138; Marsh. *v.* Jones, 21 Vt. 378.

This question of keeping a dangerous dog came up in the case of Kelley *v.* Tilton, 3 Keys, 263. Wright, J., delivered the opinion of the court. He says: "A person keeping a dog, knowing him to be accustomed to bite mankind, keeps him at his own peril. Whoever, says the court, in May *v.* Burdett, 9 Adol. & Ellis, N. S. 101, keeps an animal accustomed to attack and bite mankind, with knowledge that it is so accustomed, is *prima facie* liable in an action on the case, at the suit of any person attacked and injured by the animal, without any averment of negligence, or default in the securing or taking care of it. The gist of the action is the keeping of the animal, with knowledge of its mischievous propensities. Smith *v.* Pelah, 2 Strange, 1264; Card *v.* Carr, 57 Eng. C. L. 622. It is no defense, in such a case, that the animal is safely kept, nor do I think it a defense that the party injured is a trespasser. In the case of a dog of that character, it is the duty of the owner, having notice of his dangerous habits, to kill him. Bolton *v.* Banks, Cro. Ch. 254; Jenkins *v.* Turner, Lord Raymond, 110. In Smith *v.* Pelah, the chief justice ruled 'that if a dog has once bit a man, and the owner, having notice thereof, keeps the dog and lets him go about, or lie at his door, an action will lie against him, at the suit of a person treading on the dog; for it was owing to his not hanging the dog at the first notice; and the safety of the king's subjects ought not afterward to be endangered: the *scienter* is the gist of the action.' It is held, in the case of Loomis *v.* Terry, 17 Wend. 496, that a man may keep such a dog for the safety of his property in the night against felons, but this seems opposed to all the other cases, which hold that such an animal is a nuisance. But be this as it may, if a person will keep a mis-

chievous animal, with knowledge of its propensities, he is bound to keep it secure at his peril. May *v.* Burdett, 58 Eng. C. L. 99; Jackson *v.* Smithson, 15 Mees. & Wels. 563; Cord *v.* Carr, *supra.* It is not, however, necessary to deny in this case that it would be a good defense if the dog were securely fastened." Blair *v.* Forehand, 100 Mass. 136; S. C., 1 Am. 94.

146. FOR KEEPING DOG ACCUSTOMED TO KILL ANIMALS.

The said A B, plaintiff, complains of the said C D, defendant, for that the said C D heretofore, and before the committing of the injuries hereinafter mentioned, and up to and until the time of the said injury to the cattle of the said plaintiff, did keep a certain dog, which dog he, the said defendant, knew was accustomed to hurt, chase, bite and kill cattle, horses, and other animals; and that the said dog did afterward, and while the said defendant so kept him, to wit, on the day of , A. D. 18 , and on divers other days and times between that day and the commencement of this action, hurt, chase, bite and worry, to wit, cattle, (horses, etc., *as the case may be,*) by means whereof, divers, to wit, (ten) of said cattle, etc., died, and the residue thereof were greatly terrified, damaged, and injured, and rendered of little or no value to the said plaintiff; to the damage of the said plaintiff $.

Wherefore he prays judgment against the said defendant for the said sum of $, his damages aforesaid, in form aforesaid sustained.

147. FOR SHEEP KILLED BY DEFENDANT'S DOG.

The said A B, plaintiff, complains of the said C D, defendant, for that the said defendant, before and at the time of the committing of the injury hereinafter mentioned, was the owner (or, harborer,) of a certain dog; and that the said dog, while so owned by the said defendant, did, on the day of , A. D. 18 , and on divers other days and times between that day and the commencement of this action, kill, to wit, (ten) sheep of the said plaintiff, and did injure other sheep of said plaintiff; to the damage of the said plaintiff $.

Wherefore he prays judgment against said defendant for the said sum of $, his said damages so as aforesaid sustained.

Our statute renders the owners or harborers of dogs liable for all damages they may do to sheep, though the owner may be ignorant that his dog has ever injured sheep. 1 S. & C. 71. As to all other animals, a *scienter* is still necessary to a recovery. In New

York, it has been decided that a joint action does not lie against the separate owners of dogs by whom the sheep of a third person have been worried and killed. Van Steenberg *v.* Tobias, 17 Wend. 562. Each owner is responsible for the injury done by his own dog, and no more. Auchmuty *v.* Ham, 1 Denio, 495. In Ohio, suits in the Court of Common Pleas have been sustained jointly against the owners of dogs which have in company committed the injury. This question, however, was neither argued nor raised. In Park *v.* Slack, 7 Barr, (Pa.) 251, it was held that trespass, as well as case, would lie against the owner of a dog for killing sheep. The same was held as to an injury caused by a bull. Dolph *v.* Ferris, 7 Watts & Serg. 369. These cases would seem to justify the doctrine of joint liability.

148. OBSTRUCTING STREET.

The said A B, plaintiff, complains of the said C D, defendant, for that, before and at the time of the committing of the injury hereinafter mentioned, there was, and from hence hitherto has been, a certain public highway (or, street, *if in a town or city*, called street,) for the free passage of all persons on foot and with their teams, horses, wagons and carriages, at all times; and yet the said defendant, well knowing the premises, heretofore, on the day of , A. D. 18 , (*exact time not material, so before the accident,*) wrongfully caused to be put and placed divers large quantities of dirt, rubbish, stones, and other materials, (*as the fact may be: the obstruction should be correctly stated,*) in the said public highway, (or, street,) whereby the plaintiff, lawfully passing in and along said highway, (or, street,) in a certain carriage, drawn by horses, was then and there, by reason of said rubbish and material, so wrongfully placed in said highway, (or, street,) with great force and violence overturned, without the fault or negligence of the plaintiff; and his said wagon was broken and greatly injured, as well as the leg of the plaintiff, (*state any special damage, if there was any; if none, the whole averment should be left out,*) whereby the said plaintiff was put to great expense in curing his said leg, as well as in repairing his said wagon, to wit, to the sum of $, and was unable to attend to his usual business for the space of months; to the damage of the plaintiff $.

Wherefore he prays judgment against the said defendant for the said sum of $, his said damages so as aforesaid sustained.

149. FOR KEEPING A HOLE OPEN, THAT PLAINTIFF FELL INTO IT.

The said A B, plaintiff, complains of the said C D, defendant, for that the said defendant, before and at the time of the suffering of the injury, as hereinafter stated, was the possessor and occupier of a certain storehouse, (or shop, dwelling-house, *as the case may be*,) situate on and adjoining to the side of street, between street and street, in the city (or, town) of , in the county of , which said street was then a public highway, open and free to all persons, to pass and repass at their will and at all times; and that before and at the time of the injury aforesaid, there was a certain hole opening into the cellar or vault under and belonging to the said premises of the said defendant; yet the said defendant, well knowing the premises, did, on the day of , A. D. 18 , wrongfully permit said hole to be and continue open, to the great danger of persons passing along said street; that the said plaintiff, without his fault or negligence, in passing along said street, on the day of , A. D. 18 , unavoidably fell into the said hole, and thereby the left leg of the said plaintiff, (or other injury, *as the fact may be*,) was then and there fractured and broken; and he, the said plaintiff, became and was lame and diseased, and so remained for the space of months, (and still continues lame, *where such lameness is permanent*,) and was prevented from attending to his necessary business, and put to great expense, to wit, to the sum of $, in and about trying to get healed and cured of his said injury; to the damage of the said plaintiff, $.

Wherefore he prays judgment against the said defendant, for the said sum of $, his damages so as aforesaid sustained.

No action will lie for a public nuisance, unless plaintiff has sustained some special damage; then he can sustain an action against the party bound to repair the road, or the person who placed the obstruction, or left open the hole, by reason of which he was injured. Comyn's Dig., Action on Case for Nuisance, C. 9 Coke, 112, b. 113; 2 Term, 667; 11 East, 61; 12 Ib. 432; 4 M. & S. 101; 2 Bing. 156, 263; Stetson *v.* Faxon, 19 Pick. 147; Pittsburg *v.* Scott, 1 Penn. St. 309; Thayer *v.* Boston, 19 Pick. 511; Myers *v.* Malcolm, 6 Hill, 292. To keep a large quantity of gunpowder near where persons dwell is a nuisance, and one injured by its explosion can recover damages. Ib.; Borden *v.* Crocher, 10 Pick. 388; Lansing *v.* Smith, 4 Wend. 9; Harrison *v.* Sterrell, 4 Har. & McHen.

540; Story *v.* Hammond, 4 Ohio, 376; Shaw *v.* Cummisky, 7 Pick, 76.

In case of obstruction to highway and streets, the plaintiff can not recover, if he did not use ordinary care to avoid the injury. Smith *v.* Smith, 2 Pick. 621; Irwin *v.* Spring, 6 Gill, 200.

The person whose duty it is to remove the nuisance, or keep a hole protected, is alone liable. Where A hired B to do a job of work for him, and B left it so that one fell in and was injured, it was held that A was not liable. Blake *v.* Ferris, 1 Selden, 48. The party doing the work and his servants are liable. Ib.; Lougher *v.* Painter, 5 Barn. & Cress. 560; Milligan *v.* Wedge, 12 Adol. & Ellis, 737. So where A has a carriage, and hires horses and a driver of B, B is alone liable for an injury to another resulting from the carelessness of the driver. He is not the servant of the owner of the carriage, but of the owner of the horses. Quarman *v.* Burnett et al., 6 M. & W. 497; Rapson *v.* Cubit, 9 Ib. 709; Hobbit *v.* The N. W. Railway Co., 4 Welsb., Hurlst. & Gordon, 254; Allen *v.* Haywood, 7 Adol. & Ellis, N. S. 960. The city of New York is liable for injuries arising from neglect of those employed by its officers. Lloyd *v.* The Mayor, etc., of New York, 1 Selden, 369.

150. NEGLIGENCE IN LEAVING A DITCH SO THAT PLAINTIFF FELL IN.

The said A B, and E his wife, plaintiffs, complain of the said C D, defendant, for that the said defendant was, on the day of , A. D. 18 , at , possessed of certain real estate, situate street, in said city of , and did, by his agents and servants, dig and open a certain ditch or trench on said premises, and into the sidewalk of said street, and did then carelessly permit the said ditch or trench to remain open and uncovered, and without fixing any light near the same; and that the said , wife of the said A B, plaintiff, did, in consequence of the negligence of the said defendant and his said servants, in passing along said street, accidentally fall into the said ditch or trench, and was thereby greatly injured, bruised, and hurt; to the damage of the said plaintiffs $.

The said plaintiffs therefore pray judgment against the said defendant for the said sum of $, their damages so as aforesaid sustained.

Vide 9 Pr. 543.

151. FOR NEGLIGENTLY MINING UNDER PLAINTIFF'S BUILDINGS, WHEREBY THEY WERE INJURED.

The said A B, plaintiff, complains of the said C D, defendant, for that, before and at the time of committing of the grievances by the said defendant, as hereinafter mentioned, to wit, on the day of , A. D. 18 , the said plaintiff was seized in fee of the following lands and tenements, situate in the said county of , with certain houses, cottages, and other buildings thereon standing; and that the said premises were contiguous to certain other lands, and of right ought to have the support of the said contiguous lands, and by the strata under the same, and also by the strata of minerals under the land of the said plaintiff; of which last-mentioned strata of minerals the said plaintiff was not seized, nor did the same belong to him; and the said plaintiff further saith that the said defendant, on the day of , A. D. 18 , aforesaid, wrongfully and negligently, and without leaving proper or sufficient supports in that behalf, and contrary to right and custom in that respect, worked certain coal and other mines under the said land, houses, cottages and other buildings of the said plaintiff, and under the land so contiguous to the same as aforesaid, and dug for, got, and removed the coals, minerals, earth, and soil, of and in the said mines, so that by reason thereof the soil and surface of the said land of the said plaintiff sank and cracked, and that his said houses, cottages, and other buildings were injured, and the said land impaired in value, and other wrongs done; to the damage of the said plaintiff $.

The said plaintiff therefore prays judgment against the said defendant for the said sum of $, his damages so as aforesaid sustained.

A B,
By , his Attorney.

This petition is copied from the declaration in the case of Nicklin *v.* Williams, 26 Eng. L. & Eq. 549, and it was there held good. The right of action in such a case accrues, when the support is removed, even if at that time no actual injury has been sustained. The injury to the right is enough to maintain the action.

152. FOR NEGLIGENCE IN KEEPING A SEWER, WHEREBY PLAINTIFF WAS INJURED.

And the said A B, plaintiff, complains of the said C D, defendant, for that before and at the time of the committing of the grievances hereinafter mentioned, to wit, on the day of , A. D. 18 , the said plaintiff was possessed of a certain house and shop, with a certain cellar under the same and thereto belonging, in which said house, shop, and cellar the said plaintiff then carried on his trade and business of a grocer; and that the defendant had, for his own accommodation and convenience, before that time made and constructed, and at the time when the said grievances hereinafter mentioned were committed, kept, and continued, so made and constructed a certain sewer or water-course, in and under a certain street or highway near to the house, shop, and cellar of the said plaintiff, and which said sewer or water-course was under the management and control of the said defendant; and into which sewer or water-course he, the said defendant, from time to time caused and permitted large quantities of water to flow, which said water then flowed and passed in and along the said sewer or water-course, and near to the said cellar of the said plaintiff, of all which the said defendant, before and at the time of the committing of the said grievances hereinafter mentioned, had notice; yet the said defendant, not regarding his duty in that behalf, so negligently, insufficiently, and improperly made and constructed the said sewer or water-course, and at the time of the committing of the said grievances, kept and continued the same so negligently, insufficiently, and improperly made and constructed, and in such an insufficient and improper state, and did also, at the said time, so negligently and improperly manage the said sewer and water-course, and permit such large and unreasonable quantities of water to flow into the same, that on the day of , A. D. 18 , divers large quantities of water penetrated and burst through and flowed out of and from the said sewer and water-course of the said defendant into the said cellar of the said plaintiff, and thus greatly damaged and destroyed divers large quantities of groceries, and other goods of the said plaintiff, then lawfully being in the said cellar, in the way of plaintiff's said trade and business; to the damage of the said plaintiff $.

The said plaintiff therefore prays judgment against the said defendant for the said sum of $, his damages so as aforesaid sustained.

This is copied from the declaration in the case of Alston *v.* Grant, 24 Eng. L. & Eq. 122, where it was held that the landlord was responsible to his tenant, if he had a sewer so improperly constructed and kept that it burst, and water flowed into the premises of the tenant to his injury. The court held that if the sewer was not constructed with proper care and skill, considering the works which were near it, and the flow of water to come down, and the various drains which entered into it, the plaintiff was entitled to compensation; though it was no nuisance so long as all the property remained in the possession of the defendant. When he let the house to the plaintiff a duty arose on the part of the defendant, which required him to take care that that which was before rightful should not be so continued as to become wrongful; that would be in derogation of his own demise of part of the property to the plaintiff. The admission that the defendant maintained the sewer in a defective state, admits a wrong by which his neighbor was injured. Tenant *v.* Goldwin, 2 Ld. Raym. 1089; Vaughn *v.* Menlove, 3 Bing. N. C. 468; Cooper *v.* Barber, 3 Taunt. 99; Arden *v.* Pullen, 10 M. & W. 321.

153. FLOWING WATER.

The said A B, plaintiff, complains of the said C D, defendant, for that the said plaintiff, before and at the time of the committing of the injuries hereinafter mentioned, was possessed of a certain grist-mill, (or, flouring-mill, or, saw-mill, or *both, as the case may be.*) situate on creek, in the said county of , and above the premises of the said defendant hereinafter mentioned, and had the right to have the water of said creek flow from his said mill, and from the wheels of the same, in the natural channel of said creek, and without any obstruction whatever; yet the said defendant afterward, to wit, on the day of , A. D. 18 , erected a dam across the bed of said creek to a great height, and ever since hath kept the same up, and obstructed and stopped during all that time the natural flow of the water of said creek, and raised the water in the bed of said creek, and back upon the mill and premises of the said plaintiff, and upon the wheels of the said plaintiff's mill, to wit, to the height of feet, thereby impeding and checking the natural flow of said water therefrom, and the movement and motion of said wheels, and greatly diminishing the value of said mill; to the damage of the said plaintiff $.

Wherefore the said plaintiff prays judgment against the said defendant for the said sum of $, his said damages so as aforesaid sustained.

154. FOR CONTINUANCE OF SAME.

(*Copy the above to* whatever:) yet the said defendant hath kept up a certain dam, before that time erected across the bed and channel of said creek, and raised and backed up the water in the channel of said creek to a great height, to wit, the height of , from the day of , A. D. 18 , until the commencement of this suit, and during all that time hath by his said dam raised the water in said creek, on the mill of the said plaintiff, and on the wheels of the said mill, thereby greatly impeding the flow of the water from the mill and wheels of the said plaintiff, and checking the motion of said wheels and mill, and diminishing the power and usefulness thereof; to the damage of the said plaintiff $.

Wherefore he prays judgment, etc.

155. FLOWING LAND AND FORD.

The said A B, plaintiff, complains of the said C D, defendant, for that the said plaintiff, before and at the time of the commitment of the wrongs and injuries hereinafter stated, was possessed of certain lands, situate and being in , (*here describe them,*) and through and over which a certain creek or stream known as , had and of right ought to run in its natural channel unobstructed by any person or thing whatever; and the said plaintiff further saith that he had a certain ford over and across the said stream upon his said premises aforesaid, by which he was enabled to pass and repass said stream to and from the said premises, situate on either side of said creek; and yet the said defendant, well knowing the premises, did, on the day of , A. D. 18 , erect and put up a dam across said stream, below the premises of the said plaintiff, and hitherto, and ever since, has kept up the said dam to the height of feet, and thereby has raised the water in the channel of said creek, on the premises of the said plaintiff, to the height of feet, and in and upon the said ford to the height of feet, thereby rendering it difficult and unsafe for the plaintiff to pass the same, as of right he should; and has raised and flowed the water of said creek back, upon and over the said land of the said plaintiff, to wit, over acres of meadow, acres of plow-land, and acres of woodland, thereby greatly injuring and impairing the use and value of the same; to the damage of the said plaintiff $.

Wherefore he prays judgment against the said defendant for the said sum of $, his damages so as aforesaid sustained.

156. FOR DIVERTING WATER FROM A MILL.

The said A B, plaintiff, complains of the said C D, defendant, for that the said plaintiff, before and at the time of the committing of the grievances hereinafter stated, was possessed of a certain water-mill, called a corn or grist-mill, (or, saw-mill, or *both, as the case may be.*) with the appurtenances, situate on creek, (or, river, or, brook.) at , in the county of and that the said plaintiff ought of right to have all the water of said creek, (or, river, or, brook.) running in its natural channel to said mill without its being unreasonably retarded or in any way obstructed and diverted therefrom; yet the said defendant, not ignorant of the premises, did, on the day of , A. D. 18 , dig up and remove the bank of said stream, and thereby divert a great part of the water thereof, so naturally running in said stream, from the bed of said creek, and from the said mill of the said plaintiff, and hath from thence hitherto, and up to the commencement of this suit, kept up and continued the diversion of said water from the bed of said creek, and from the said mill of the said plaintiff, so that the said mill, which before said diversion of the water of said creek, was able and used to grind, (or, saw, etc.,) fifty bushels of corn in every twenty-four hours, now, and during the time aforesaid, by reason of the diversion aforesaid of the water of said stream, is and was able to grind, (or, saw, etc.,) only bushels of corn in every twenty-four hours; by means whereof the said plaintiff hath been deprived during all that time of the usual profits of his said mill, and still continues deprived thereof; to the damage of the said plaintiff $.

Wherefore he prays judgment against the said defendant for the said sum of $, his damages so as aforesaid sustained.

An action will also lie for diversion of the water of a stream, when needed for agricultural or any other purpose by the riparian proprietor. He is entitled to have the stream run as it naturally would, subject to the right of those above him to use the water for mills, irrigation, watering stock, etc. The right of irrigation is limited by the fact whether the quantity of water in the stream is materially lessened. The use must be such as returns the water to the channel, and does not materially lessen its volume; so that the proprietor below may have enough for his purposes. The law on this subject will be found fully stated in Angell on Water-Courses, 122. See also the following cases: Strutt *v.* Bovington, 5 Esp. 56;

Greenslade *v.* Holliday, 6 Bing. 379; Gale & Wheat. on Easements, 284; Evans *v.* Merryweather, 3 Scam. 496; Weston *v.* Alden, 7 Mass. 136; Ingraham *v.* Hutchinson, 2 Conn. 584; Colburn *v.* Richards, 13 Mass. 420; Anthony *v.* Lapham, 5 Pick. 175; Blanchard *v.* Baker, 8 Greenlf. 253; Arnold *v.* Font, 12 Wend. 330; Wadsworth *v.* Tillotson, 15 Conn. 366.

In Cooper *v.* Hall, 5 Ohio, 321, it was held that an action would not lie for flowing or deepening water in the channel of the stream on one's premises, unless some *actual* injury be sustained. This case is against all the authorities, and wrong in principle, and has been disregarded on the circuit by the late Supreme Court. In Ewing *v.* Wolf, Athens S. C., the court held that the deepening of water in the channel of a stream, so as to render the fording more difficult, was actionable, even though the plaintiff's land was wild land, and he had never used the ford. There is an injury to the *right*, and if the plaintiff can not sustain an action until he has sustained *actual* damage, the defendant might, by lapse of time, acquire an absolute right to flow; unless the court should hold that no adverse use could be implied until injury sustained. Still the cases are that injury to the naked right to have the water flow as it would naturally do, is sufficient to maintain an action. So held in the following cases: 16 Pick. 241; 12 Maine, 407; 2 Story, 661; 9 N. H. 88; 17 Pick. 23; 17 Conn. 288; 4 Barr, (Pa.) 486; 25 Maine, 209; 3 Greenl. 116; 1 Rawle, 21; Angell on Water-Courses, 142; Fortman *v.* Rottier, 8 Ohio St. 548.

157. FOR MALICIOUS PROSECUTION.

The said A B, plaintiff, complains of the said C D, defendant, for that the said defendant heretofore, to wit, on the day of , A. D. 18 , not then having any reasonable or probable cause therefor against said plaintiff, but unjustly contriving and intending to injure the said plaintiff and break up his business, he, the said plaintiff, then being engaged in the business of a merchant, did falsely and maliciously cause and procure to be sued out of the Court of Common Pleas, within and for the county of , a certain writ of attachment in a certain action then and there pending, wherein C D was plaintiff, and the said A B defendant, directed to the sheriff of said county, commanding said sheriff, (*here state substance of writ,*) and delivered the same to the said sheriff, and caused and required the said sheriff to levy said writ of attachment on the store of goods, wares, and merchandise of the said plaintiff; and that said sheriff did so levy said writ upon said

goods, wares, and merchandise of the said plaintiff, and took the same into his possession, and the said defendant afterward applied to the said Court of Common Pleas, (or, to E F, one of the judges of said court, *if in vacation*,) and obtained an order from said court, (or, judge,) for the sale of said goods and merchandise, and caused said sheriff to sell the same at a great sacrifice; and the said plaintiff further saith that the said action of the said defendant afterward came on for trial at the term of said court, A. D. 18 , and was tried, and a verdict and judgment rendered in favor of the said plaintiff; to the damage of the said plaintiff $.

Wherefore he prays judgment against the said defendant for the said sum of $, his said damages so as aforesaid sustained.

The averment of no indebtedness may be omitted, and a suit maintained for maliciously suing out an attachment. Tomlinson & Sperry *v.* Warner, 9 Ohio, 103. The averment that the suit was terminated must also be omitted, where such was not the case. At common law there must have been an arrest, in order to justify an action for malicious prosecution. Ib.

158. FOR AN ARREST ON STATE WARRANT.

The said A. B., plaintiff, complains of the said C D, defendant, for that he, the said plaintiff, hath hitherto, and until the committing of the injury hereinafter stated, sustained a good character, and has never been suspected of the crime of , or any other crime; yet the said defendant, well knowing the premises, but maliciously contriving and intending to injure the said plaintiff in his good name, to cause him to be imprisoned, and put him to great trouble and expense, did, on the day of , A. D. 18 , go before one , he, the said , being then a justice of the peace for the said county of , and then and there, before the said , justice as aforesaid, falsely and maliciously, and without any reasonable or probable cause whatsoever, charged the said plaintiff with, (*here set out the crime as in the affidavit.*) and upon said charge, then caused the said justice of the peace to make and grant a warrant in due form of law, under his hand and seal, for the apprehending and taking of the said plaintiff, and bringing him before said justice of the peace, or some other justice within said county of , to be dealt with according to law for the said supposed offense. And the said defendant, under and by virtue of said warrant, afterward, to wit, on the day of , A. D. 18 , wrongfully and unjustly, falsely and maliciously, and without any

reasonable or probable cause therefor, caused and procured the said plaintiff to be arrested, and to be imprisoned, and kept and detained for a long space of time, to wit, for the space of hours next following; and until afterward, to wit, on the day of , A. D. 18 , he, the said defendant, falsely and maliciously, and without any reasonable or probable cause whatsoever, caused and procured the said plaintiff to be carried in custody, before the said , justice of the peace as aforesaid; (*if the plaintiff was committed before examination was completed, then insert:* and to be committed by the said justice, for further examination, to the jail of said county, or to the custody and safe-keeping of , a constable of said county of , and to be kept in said jail, or in the custody of said for the space of days then next following, until he, the said defendant, afterward, to wit, on the day of , A. D. 18 , caused said defendant to be again brought in custody before the said , justice as aforesaid,) to be examined before the said justice of the peace, touching the said supposed crime; which said justice, having heard and considered, all and singular, the evidence adduced by said defendant against the said plaintiff, concerning the said crime then and there adjudged, and determining that the said plaintiff was not guilty of the said supposed crime, then and there discharged the said plaintiff out of custody, fully acquitted and discharged of said crime; and the said defendant hath no further prosecuted his said complaint, but wholly abandoned the same, so that said complaint and prosecution is wholly ended and determined; by means of which the said plaintiff hath been greatly injured in his good name, and been put to great expense, to wit, to the sum of $, in and about procuring to be discharged from his said imprisonment, and hath been greatly hindered in his lawful business for the space of days; to the damage of the said plaintiff $.

Wherefore he prays judgment against the said defendant for the said sum of $, his said damages so as aforesaid sustained.

159. SAME, WHERE THE PARTY HAS BEEN BOUND OVER TO PROBATE COURT.

(*In lieu of the words from* which said justice, *to the averment of damages, insert the following:*) and then and there falsely and maliciously procured the said justice of the peace to require the said plaintiff to give bail in the sum of $, for his appearance before the Probate Court at its term next thereafter, to be held to answer unto the said offense, and that the said plaintiff then and there

gave bail in the said sum of $, with one as his surety, to the acceptance of said justice, (*or in case bail was not given,*) and that the said plaintiff, being unable to procure bail in said sum for his said appearance, was, by the order of the said justice of the peace, committed to the jail of said county, there to remain until discharged by due course of law; and that the said defendant falsely and maliciously, and without reasonable or probable cause, procured the said plaintiff to be imprisoned in the jail of said county for the space of days, until he, the said defendant, afterward, on the day of , A. D. 18 , falsely and maliciously, and without reasonable or probable cause, caused and procured the said plaintiff to be brought before the Probate Court of said county, to answer to an information then and there by the said defendant procured to be filed against the said plaintiff, to which information the said plaintiff then and there plead not guilty; and the said issue so made up then and there came on by the consent of this defendant, to be heard before , the judge of said court, and a verdict was, by said court, rendered on said issue, that the said plaintiff was not guilty of the offense so alleged against him, and it was by said court further adjudged that the said plaintiff go hence thereof, and be wholly discharged therefrom, and the said prosecution became, and is wholly ended and determined. (*Then add damages and conclusion as in last form.*)

160. FOR PROCURING PLAINTIFF TO BE INDICTED.

The said A B, plaintiff, complains of the said C D, defendant, for that the said defendant, contriving and maliciously intending to injure the said plaintiff in his good name and credit, and to bring him into public scandal and disgrace, and to cause it to be believed that he had been guilty of the crime of , to wit, on the day of , A. D. 18 , at the term of the Court of Common Pleas, within and for the county of , falsely and maliciously, and without probable cause, indicted, and caused and procured the said plaintiff to be indicted, by the grand jury of said county, then and there duly impaneled and sworn by said court to inquire of crimes within and for the said county of ; and the said plaintiff further saith that the said defendant afterward, falsely and maliciously, and without reasonable or probable cause, prosecuted, and caused to be prosecuted, the said indictment against the said plaintiff, until afterward, to wit, at the term of the said Court of Common Pleas, begun and held on the day of , A. D. 18 , at the court-house in , in said county of , the said plaintiff

was in due manner and by due course of law acquitted of the said premises in the said indictment charged upon him, by a jury of the said county of ; whereupon it was then and there adjudged by the said court that the said plaintiff go hence thereof without day, and the said plaintiff was then and there discharged of and from the premises in said indictment specified, as by the record and proceedings thereof remaining in said court appears. By means whereof, etc. (*state the damages and conclusion as in previous form.*)

For other forms, *vide* 2 Chit. Pl. 610 *et seq.* For the law, see 1 Saund. 228, 230, notes; 9 East, 361; 5 Taunt. 187; 1 Term, 493; Anderson *v.* Buchanan, Wright, 725; Morris *v.* Scott, 21 Wend. 281; Williams *v.* Hunter, 3 Hawks, 545. Want of probable cause is essential; if probable cause, though malicious, defendant is not liable. Payson *v.* Caswell, 9 Shepley, 212; Wood *v.* Wier, 5 B. Mon. 544; Leiding *v.* Rawson, 1 Scam. 272. What is probable cause? It is the existence of such facts and circumstances as would excite in a reasonable mind a belief of the guilt of the person charged. Hall *v.* Hawkins, 5 Humph. 357; Farris *v.* Starke, 3 B. Mon. 4; 3 Mo. 37; 9 Shepley, 212; 2 Ib. 362; 11 Ib. 566; 4 Dana, 120.

As to pleading: 8 N. H. 157; 6 Watts & Serg. 336; 3 Hill, (S. C.,) 195; 5 Blackf. 428, 390. Prosecution must be ended. 3 Mon. 208.

161. FOR LIBEL.

The said A B, plaintiff, complains of the said C D, defendant, for that the said plaintiff hath always sustained a good character, and been reputed and accepted in the community to be a person of good name, fame, and credit, and never suspected of having been guilty of (*here set forth the pith of the libel, whatever it may be, as of the crime of perjury, or larceny, or forgery, or fraud, or bribery,*) yet the said defendant, will knowing the premises, and maliciously intending to injure the said plaintiff, and to bring him into public scandal and disgrace among his neighbors, did, on the day of , A. D. 18 , falsely, wickedly, and maliciously publish, and cause to be published, of and concerning the said plaintiff, a certain false, scandalous, and malicious libel, containing, among other things, the false, malicious, defamatory, and libelous matter following, of and concerning the plaintiff, that is to say: (*here set out the libel in its words, with the necessary innuendoes to make it applicable to the plaintiff;*) by means whereof the said plaintiff hath been greatly damaged and injured in his good name and reputation; to the damage of the said plaintiff $.

Wherefore he prays judgment against the said defendant for the said sum of $, his damages so as aforesaid sustained.

162. FOR LIBEL OF ONE IN HIS PROFESSION.

The said A B, plaintiff, complains of the said C D, defendant, for that the said plaintiff, for a long time before and at the time of the committing of the injuries by the said defendant hereinafter mentioned, had been, and was, and still is, an attorney at law of the several courts of record in and for the State of Ohio, duly admitted as such to practice therein, as such attorney, and had practiced, and still continues to practice, as such attorney at law, in the several courts of record in said State of , and had always, as such attorney at law, conducted and demeaned himself with honesty and fidelity, and had never been guilty, or suspected to have been guilty, of any misconduct or malpractice, in his said capacity and profession of an attorney at law; yet the said defendant, well knowing the premises, and maliciously intending and contriving to injure said plaintiff, in his said capacity and profession of an attorney at law, as aforesaid, on the day of , A. D. 18 , did publish, and cause and procure to be published, of and concerning the said plaintiff, and of and concerning him, in his said capacity and profession of an attorney at law, a certain false, malicious, and defamatory libel, containing, among other things, the following false, malicious, and libelous matter, of and concerning the said plaintiff, and of and concerning him in his capacity and profession of an attorney, as aforesaid, that is to say: (*here set out the libel with the proper innuendoes,*) by means of which said premises the said plaintiff hath been and is greatly injured and prejudiced in his reputation aforesaid, and has also lost and been deprived of great gains and profits, which would otherwise have arisen and accrued to him, in his said profession and business; to the damage of the said plaintiff $.

Wherefore he prays judgment against the said defendant for the said sum of $, his damages so as aforesaid sustained.

Chitty says there is no necessity for averring how the publication was made, whether by letter, newspaper, or otherwise. For other forms, *vide* 2 Chitty Pl. 624 to 633. Where words are not libelous without extraneous facts, those facts must be stated in the introduction or inducement; as an innuendo can not extend, but only apply, the words. Nichols *v.* Packard, 16 Vt. 83; Brown *v.* Brown, 2 Shepley, 317; Harris *v.* Burley, 8 N. H. 256; Linville *v.* Earlywine, 4 Blackf. 469; Tappan *v.* Wilson, 7 Ohio, (pt. 1,) 190.

As to what is a libel, see Watson *v.* Trask, 6 Ohio, 571; Gage *v.* Robinson, 12 Ib. 250; Fisher *v.* Patterson, 14 Ib. 418.

163. VERBAL SLANDER, FOR CALLING ONE A THIEF.

The said A B, plaintiff, complains of the said C D, defendant, for that the said plaintiff, before and at the time of the committing by the said defendant of the grievances hereinafter mentioned, sustained a good name and character among his neighbors and acquaintances, for moral worth and integrity, and was never suspected of the crime of larceny; yet the said defendant, well knowing the premises, and maliciously intending to injure the good name and character of the said plaintiff, and to cause it to be believed that he had been guilty of the crime of larceny, on the day of , A. D. 18 , in a certain discourse, which he then had, of and concerning the plaintiff, and in the presence and hearing of divers good people, falsely and maliciously spoke and published, of and concerning the said plaintiff, the false, scandalous, and malicious words following, that is to say: "he," meaning the plaintiff, "is a thief;" "he," meaning the plaintiff, "stole a horse;" "you," meaning the plaintiff, "are a thief;" and by means of the speaking of said defamatory words, the said plaintiff hath been greatly injured in his good name and character; to the damage of the said plaintiff $.

Wherefore he prays judgment against the said defendant for the said sum of $, his damages so as aforesaid sustained.

164. FOR SLANDER, ON CHARGE OF PERJURY.

The said A B, plaintiff, complains of the said C D, defendant, for that the said plaintiff, before and at the time of committing the injuries hereinafter mentioned, had sustained a good character, and had been examined as a witness on the trial of an action, wherein the said defendant was plaintiff, and one was defendant, in the Court of Common Pleas, within and for the county of , at its term, A. D. 18 , and given testimony on said trial in favor of said , defendant in said action, and the said plaintiff further saith that the said defendant, well knowing the premises, and maliciously intending to injure the said plaintiff in his good name, and to cause it to be believed that said plaintiff had been guilty of perjury, on the trial of the aforesaid action, did, on the day of , A. D. 18 , in the presence and hearing of divers persons, falsely and maliciously speak and publish of and concerning the said plaintiff, and of and concerning the testimony of the

said plaintiff, given by him on the trial of the action aforesaid, the following false, malicious, and defamatory words, that is to say: "he," meaning the said plaintiff, "swore a lie;" meaning thereby that said plaintiff on said trial had committed willful and corrupt perjury in the giving of his testimony aforesaid, (*set out any other words, and conclude as in the last.*)

165. FOR CRIMINAL CONVERSATION.

The said A B, plaintiff, complains of the said C D, defendant, for that the said defendant, contriving and intending to injure the said plaintiff, and to deprive him of the fellowship of E F, the wife of said plaintiff, and to alienate her affection for the said plaintiff, did, on the day of , A. D. 18 , and on divers other days and times between that day and the commencement of this action, wickedly and unjustly debauch and carnally know the said E F, then and there still being the wife of the said plaintiff, whereby the affection of the said E F for the said plaintiff was then and there alienated, and the said plaintiff hath hitherto lost and been deprived of the society, comfort, aid, and assistance of his said wife in his domestic affairs; to the damage of the said plaintiff $.

Wherefore the said plaintiff prays judgment against the said defendant for the said sum of $, his damages so as aforesaid sustained.

166. FOR DEBAUCHING A DAUGHTER.

The said A B, plaintiff, complains of the said C D, defendant, for that the said defendant, unjustly intending to injure the said plaintiff, and to deprive him of the services and assistance of E F, the daughter and servant of the said plaintiff, did, on the day of , A. D. 18 , and on divers other days between that day and the commencement of this action, debauch and carnally know the said E F, then and there, and before and since, the daughter and servant of the said plaintiff; whereby the said E F became pregnant and sick with child, and so remained for a long space of time, to wit, for the space of nine months thence next following; at the expiration whereof the said E F was delivered of the child with which she was pregnant, as aforesaid; by means of which said several premises, she, the said E F, for a long space of time, to wit, one year, was unable to do the needful business of the said plaintiff, he, the said plaintiff, so being the father and master of the said E F; and the said plaintiff lost the services of the said E F during all that time; and the said plaintiff was put to great expense, and did pay out a large sum, to wit, the sum of $, in and about the

nursing and taking care of the said E F, his said daughter and servant, and in and about the delivery of the said child; to the damage of the said plaintiff $.

Wherefore the said plaintiff prays judgment against said defendant for the said sum of $, his damages so as aforesaid sustained.

If the female was not the daughter of the plaintiff, leave out the word "daughter," and retain only that of "servant." The loss of service is the gist of the action, and the master can alone sustain the action. If the daughter is not living with her father, he can not sue for the seduction. Briggs *v.* Evans, 5 Iredell, 16; Hewit *v.* Prime, 21 Wend. 79; Martin *v.* Payne, 9 Johns. 387; 2 A. K. Marsh. 128; 7 Wend. 193; 2 Ib. 459.

167. FOR ENTICING AWAY AN APPRENTICE.

The said A B, plaintiff, complains of the said C D, defendant, for that, before and at the time of the committing of the injuries by the said defendant hereinafter mentioned, one E F was, and from thence hitherto hath been, and still is, the servant (or, apprentice,) of the said plaintiff, in his trade or business of a , which the said plaintiff then exercised and carried, and still does carry on; yet the said defendant, well knowing the premises, and wrongfully contriving to injure the said plaintiff, and deprive him of the services and benefit of his said servant (or, apprentice,) did, on the day of , A. D, 18 , wrongfully entice, persuade, and procure the said E F, so then being the servant (or, apprentice,) of the said plaintiff, to depart from and out of the service of the said plaintiff, by means of which enticing, and persuasion, and procuring, the said E F did then wrongfully, and without the license of the said plaintiff, and against his will, depart from and out of the service of the said plaintiff, and hath remained absent therefrom from thence hitherto; whereby the said plaintiff, during all that time, has lost and been deprived of the services of the said E F, in his said trade and business of , and of all profits and benefits which might and would have otherwise accrued to him from such service; to the damage of said plaintiff $.

Wherefore he prays judgment against the said defendant for the said sum of $, his damages so as aforesaid sustained.

168. FOR HARBORING AN APPRENTICE

The said A B, plaintiff, complains of the said C D, defendant, for that one E F, heretofore, to wit, on the day of , A. D. 18 , was the servant (or, apprentice,) of the said plaintiff, and being such servant, (or, apprentice,) did then unlawfully, and without the license, and against the will of said plaintiff, depart and go away from and out of the service of the said plaintiff, and went and came to the said defendant; that the said plaintiff afterward, to wit, on the day of , A. D. 18 , notified and informed the said defendant of the premises, and requested him, the said defendant, not to keep and harbor the said E F, so being the servant (or, apprentice,) of said plaintiff; yet the said defendant, well knowing the premises, and contriving to injure the said plaintiff, and to deprive him of the service of the said E F, did, on the said day of , A. D. 18 , wrongfully harbor the said E F, and has kept him, the said E F, in his, the said defendant's, employ and service from that time up to the commencement of this action, whereby the said plaintiff hath lost, during all that time, all profit and benefit which otherwise he might and would have obtained from the services of the said E F; to the damage of the said plaintiff $.

Wherefore he prays judgment against the said C D for the said sum of $, his damages so as aforesaid sustained.

For the law on this subject, see Cowper, 54; 2 H. Bl. 511; 2 Esp. 734; 2 Saund. 169; 3 M. & S. 191; 7 Term, 310; Peake N. P. 55; 5 East, 39; Dubois *v.* Allen, Anthon, 94; Scidmore *v.* Smith, 13 G. R. 322; Demyer *v.* Souzer, 6 Wend. 436; Ferguson *v.* Tucker, 2 Har. & Gill, 182; Stewart *v.* Simpson, 1 Wend. 376.

The master is entitled to his apprentice's wages, when hired by another, and this whether the person hiring knew he was or was not an apprentice. James *v.* Leroy, 6 Johns. 274; Munsey *v.* Goodwin, 3 N. H. 272; Bowes *v.* Tibbits, 7 Greenl. 457; Conant *v.* Raymond, 2 Aiken, 243. But in the case of a hired servant, he is not liable without notice of his being the servant of another. 6 Johns. 274.

169. FOR CARELESS DRIVING.

The said A B, plaintiff, complains of the said C D, defendant, for that the said defendant, before the committing of the injuries hereinafter mentioned, was the owner and proprietor of a certain stage-coach, by him used for the carriage of passengers at and for hire

and reward; and the said defendant, being such owner of said coach, the said plaintiff did, on the day of , A. D. 18 , at the special instance and request of the said defendant, become and was a passenger by the said coach, to be safely carried and conveyed thereby on a certain journey, to wit, from the town (or, city,) of , to the of , for certain hire and reward to the said defendant in that behalf; and although the said plaintiff was then and there received by the said defendant as such passenger by said coach, yet the said defendant, not regarding his duty in that behalf, so carelessly, negligently, and unskillfully loaded, drove, and managed said coach, that, afterward, and whilst said coach was proceeding with the said plaintiff, as such passenger on said journey, to wit, on the day of , A. D. 18 , the said coach was, by and through the carelessness and negligence of the said defendant, overturned and thrown down, with the said plaintiff therein, as aforesaid; by means whereof the said plaintiff was greatly injured, and one of the legs of said plaintiff was broken, and fractured, and bruised, and the said plaintiff was otherwise greatly injured, wounded, and cut, insomuch that the said plaintiff then became sick, lame, and sore, and so continued for the space of months thence next ensuing, and was during all that time prevented from attending to his lawful business and carrying on the same; and the said plaintiff was forced to expend a large sum of money, to wit, the sum of $, in and about the endeavoring to cure the said fractures, wounds, cuts, and bruises; to the damage of the said plaintiff $.

The said plaintiff therefore prays judgment against the said defendant for the said sum of $, his damages so as aforesaid sustained.

The character of the injury sustained should be stated according to the fact. It is unnecessary to state the terminus of the journey; but if stated, it must be done correctly.

As to the duty of coach-owner. He is bound to exercise the highest possible degree of care, and if, by the slightest negligence on his part, an injury is sustained by a passenger, he can recover the amount of damage sustained. Talmadge *v.* Zanesville and Maysville Road Co., 11 Ohio, 197; Jones *v.* Voorhees, 10 Ib. 145; 2 Cowp. 81; 2 Esp. 533; 5 Ib. 273; 3 Bing. 321; Hall *v.* Steamboat Co., 13 Conn. 319; Ingalls *v.* Bills, 9 Metcalf, 1; Maury *v.* Talmadge, 2 McLean, 157.

170. FOR NOT CARRYING A PASSENGER SAFELY.

The said A B, plaintiff, complains of the said Little Miami Railroad Company, defendant, for that the said defendant, before and at the time of the committing of the wrongs and injuries hereinafter stated, was the owner of a certain railroad, with its cars and locomotives, leading from the city of Cincinnati to the town of Springfield, and was accustomed and used by said railroad to transport passengers and their baggage over and upon said railroad, for certain hire and reward; and thereupon the said plaintiff, on the day of , A. D. 18 , at the special instance and request of the said defendant, became and was a passenger on the railroad of the said defendant, and in the cars thereof, to be safely carried from to , for a certain hire and reward to the said defendant in that behalf; and the said plaintiff was then received by the said defendant in the cars, and on the railroad aforesaid, as such passenger, to be carried thereby as aforesaid; yet the said defendant, not regarding its duty in that behalf, did, by its servants and agents, so carelessly, negligently, and unskillfully conduct the running of said cars and railroad that, on the day of , A. D. 18 , by the carelessness, negligence, and default of its said agents and servants, and for want of due care and attention to its duty in that behalf, the said car was run off the track of said railroad, and thrown down the embankment thereof, whereby the said plaintiff was greatly cut, bruised, and wounded, and had the right leg and the left arm of him, the said plaintiff, badly fractured and broken, so that he, the said plaintiff, became and was sick, lame, and unable to walk, and was wholly unable to attend to the transaction and performance of his usual and necessary business, and so continued from thence hitherto; and said plaintiff has been put to great expense, to wit, to the amount of $, in endeavoring to cure his said wounds, bruises, and fractures; to the damage of the said plaintiff $.

Wherefore he prays judgment against the said defendant for the said sum of $, his damages so as aforesaid sustained.

171. AGAINST R. R. CO. FOR KILLING A PERSON UNDER THE STATUTE.

The said A B, administrator of the said C D, deceased, plaintiff, complains of the said M. & C. R. R. Co., defendant, for that, heretofore, to wit, on the day of , A. D. 18 , the said C D was a passenger on the cars of the said defendant, running from ,

in the county of and State of , to , in the county of and State of ; and that the said defendant, by its agents, so carelessly, negligently, and unskillfully conducted and managed said cars that the same were thrown from the track and over an embankment, and the said C D instantly killed by means of said carelessness, neglect, and unskillfulness; and the said plaintiff further saith that he has been duly appointed and qualified administrator of the said C D, so as aforesaid killed, and that the said C D left E F as his widow, and G H, I K, etc., as his next of kin; to the damage of said plaintiff five thousand dollars.

The said plaintiff therefore prays a judgment against said defendant for the said sum of five thousand dollars, his damages so as aforesaid sustained.

172. SAME IN ANOTHER FORM.

The said A B, administrator of the said C D, deceased, plaintiff, complains of the said L. M. R. R. Co., defendant, for that, heretofore, to wit, on the day of , A. D. 18 , the said defendant, by its agents, so negligently, carelessly, and unskillfully, ran its train of cars and locomotive along its track in the city of , that, without the fault of the said C D, deceased, the said train of cars and locomotive was negligently and carelessly run against and over the said C D, and the said C D was, by such neglect, carelessness, and unskillfulness, instantly killed. (*Proceed as in last form.*)

173. FOR KILLING A BRAKEMAN.

The said A B, administrator of the said C D, deceased, plaintiff, complains of the C. & H. R. R. Co., defendant, for that, the said C D was in the service of the said defendant as a brakeman on one of the train of cars of said defendant, running from to , on the day of , A. D. 18 , and that as said train was approaching the station, where it was to stop, the said C D, in obedience to the usual signal of the engineer for that purpose given, attempted to wind up one of the brakes of said train to check the speed thereof, and that in so doing the brake-chain parted and the brake gave way, whereby the said C D was then and there, without any negligence or default on his part, thrown from said train and under and between the cars thereof, and so injured thereby that he instantly (or, the same day, or, in days thereafter,) died therefrom; and the said plaintiff avers that the death of the said C D was so caused by the neglect and carelessness of the said defendant in providing and using a defective and

unsafe brake and chain; and the said plaintiff further saith that, etc. (*as in first form.*)

174. FOR SELLING MORPHINE FOR QUININE.

The said A B, administrator of C D, deceased, plaintiff, complains of the said E F and others, defendants, for that, heretofore, to wit, on the day of , A. D. 18 , at , the said C D, then being a minor under the age of twenty-one years, (or, *if a female*, under the age of eighteen years in Ohio,) was sick and had prescribed for him a certain medicine, to wit, quinine, and that the C D, by one G H. applied to the said defendants, who were then and there engaged in the business of selling drugs and medicines, and filling prescriptions given by physicians for the sick and infirm, and requested said defendants to put up grains of quinine as a prescription to be administered to the said C D, and that the said defendants then and there undertook to fill said prescription, and did then and there pretend to fill the same according to the requirements thereof; yet the said plaintiff saith that the said defendants, by their agents, so carelessly and negligently put up said prescription that, instead of putting up quinine, as was called for, they put up grains of morphine instead thereof, and that the said C D, without any fault or neglect on his part, took the said morphine so put up as and for quinine, and that the said C D afterward then and there died from the effects of said morphine; and the said plaintiff further avers that he has been duly appointed administrator of the said C D, and that one L M is the next of kin of said C D so deceased; to the damage of said plaintiff five thousand dollars.

Whereof he prays judgment against said defendants for the said sum of $5,000, his damages so sustained.

Vide Quin *v.* Moore et al., 15 N. Y. 432.

The mode of stating the injury will vary with the circumstances. It is necessary to aver the death, the appointment of administrator, and the fact of there being next of kin. It makes no difference if there is no widow. A bastard, in Ohio, is next of kin. There must be next of kin, or widow, to justify a recovery. *Vide* Lyons, Adm'r, *v.* The Cleveland & Toledo R. R. Co., 7 Ohio St. 336; Lucas *v.* N. Y. Cen. R. R. Co., 21 Barb. 247; 10 Eng. Law & Eq. 437; State *v.* Gilmore, 4 Fost. 461; Quin *v.* Moore, 15 N. Y. 432; Muhl *v.* M. South. R. R., 10 Ohio St. 272. Action lies against druggist for carelessly dealing out medicine. Quin *v.* Moore, 15 N. Y. 432;

Railroad Co. *v.* Webb, 12 Ohio St. 474; Oldfield *v.* N. Y. & H. R. R. Co., 14 N. Y. 310; Hall *v.* Crain, 2 West. L. Month. 593. The injury must be stated as though the deceased had himself brought the action.

Where the accident happens from a collision, the fact should be so stated; that the train to which said car was attached came in collision with a certain other train of cars of the said defendant, whereby the said car was with great violence thrown against another car, and off the track of said railroad, and the said plaintiff, etc. It would not seem to be necessary to describe any more minutely the manner of carriage and of the accident. 7 Ohio St. 336; 10 Ohio St. 272.

As to next of kin, the court held, in Lyon's Adm'r *v.* Cleveland and Toledo R. R. Co., that brothers and sisters of the deceased were next of kin in the absence of children. Scott, J., says in this case: "The question presented by the demurrer is, whether, under this statute, an action can be maintained for the sole benefit of the brothers and sisters of a deceased person who leaves no widow, without an allegation in the petition of such special circumstances as would render the death a pecuniary injury to them.

"A right of action is given by this statute to the personal representative of the deceased, merely as a trustee, and for the exclusive benefit of the widow and next of kin. Hence it would seem to be clear that, in order to the maintenance of the action, there must be a widow, or next of kin, to whom the amount recovered could be distributed. And so it was held under a similar statute of New York, in Lucas *v.* N. Y. Central R. R. Co., 21 Barb. 247.

But if there be persons in whom the beneficial interest in the judgment to be recovered can vest, then the only other conditions to which the right of action is subjected by the terms of the statute are: *first*, that the death shall have been caused by such wrongful act, neglect, or default, as would (if death had not ensued) have entitled the party injured to maintain an action against the defendant, and recover damages in respect thereof; *secondly*, that the action be brought by and in the name of the personal representative of the deceased; and, *thirdly*, that it be commenced within two years from the time of his death.

"Subject to these conditions, the statute gives a right of action, and seems to regard the widow and next of kin as sustaining, at least, a nominal pecuniary injury, in all such cases, from the wrongful act of the defendant. Quin *v.* Moore, 15 N. Y. 432.

"Questions may arise, upon the trial of this cause, as to the con-

struction of the rule of damages furnished by the second section of this statute; but no such questions are properly before us. The question raised by the demurrer does not relate to the *amount* of the recovery, but is simply, can an action be maintained on the case stated in the petition? We think it can." *Vide* Pierce on Am. R. R. Law, 257; Blake's Adm'x *v.* Midland R. R. Co., 10 Eng. L. & Eq. 437. In assessing damages, the jury are confined to injuries of which a pecuniary estimate can be made, and can not take into consideration the mental suffering to the survivors by his death. Blake *v.* Midland R. R. Co. *supra;* Armsworth *v.* Southeastern R. R. Co., 11 Jurist, 758; Duncan *v.* Findlater, 6 Cl. & F. 894; Canning *v.* Williamstown, 1 Cush. 451; L. R., 1 Exch. 21. Receiver of a railroad liable, as if road run by directors of corporation. Meara's Adm'r *v.* Holbrook et al., 20 Ohio St. 137; Potter, Receiver, *v.* Bunnell, 20 Ohio St. 150; Bank of Greenfield *v.* M. & C. R. R. Co., 20 Ohio St. 259.

175. AGAINST RAILROAD FOR INJURY FOR DEFECTIVE STATION.

The said A B complains of the said R. R. Co., for that heretofore and now the said defendant, a corporation duly organized under the law of the State of , was and is engaged in the business of a common carrier of passengers, for hire, on its railway, and used and employed a certain station situate at , in the of , in the county of , and on the line of its said railroad, for the reception and accommodation of the passengers in getting off and on the cars running on the said line of railroad; and that said station was in the possession and management of said defendant, and that hence it became, and is, the duty of said defendant to keep said station in a reasonably safe condition for the safety of passengers getting on and off the cars of said defendant at said station; yet the said defendant carelessly and negligently managed said station, and so carelessly and negligently kept the staircase and approaches thereto in a dangerous and slippery state and condition, and did not provide hand-rails or sufficient accommodation for safe access by and through said station to and from the cars of said defendant, that said plaintiff, by reason of the premises, and without default on his part, having been received by said defendant as a passenger at said station, fell, and was thrown down the said staircase, and greatly injured in this, to wit, (*here state the kind and extent of injury,*) and compelled to employ a surgeon, nurses, and attendants to attend upon him, while said plaintiff was confined to his home and bed by reason

of said injury, and to pay a large sum of money therefor, to wit, the sum of $, (*state all the special damage sustained, and any special expenses;*) to the damage of the plaintiff dollars.

Wherefore he prays judgment against said defendant for said sum of $, his damages so sustained.

W V P, Attorney for Plaintiff.

This petition is taken from the case of Crafter *v.* Metropolitan R. R. Co., L. R., 1 C. B. 300; Longmore *v.* G. W. R. R. Co., 19 C. B., N. S. 183; Toomey *v.* The Brighton R. R. Co., 3 C. B., N. S. 146. In the first case the evidence showed no negligence, but in Longmore's case it did.

176. FOR INJURIES ON STREET RAILROAD.

The said A B complains of the said , a corporation organized under the law of , for that the said defendant, on the day of , A. D. 18 , was the owner of a certain street railroad line, with its cars running thereon, and which cars were drawn by horses, from the corner of streets to a point , in the city of , in the county of ; and that on said day of , A. D. 18 , the said plaintiff was walking along street, between and streets, in said city of , the same being a public highway, open and free to all persons to pass and repass at all times at their own free will and pleasure; and that an excavation had been dug across said street, at or near to said street, and over which excavation the track of said railroad ran, and the said excavation was dangerous for the cars and horses of said defendant to pass, and that for safety to said cars and horses, the said defendant, by its agents and servants, caused the horses drawing car No. 4, on said line, to be unhitched from said car, and attempted to drive the said horses around said excavation, and in so doing the said defendant, by its agents and servants, so negligently, carelessly, and improperly conducted and managed said business and horses, that the said horses ran off and away from said servants of said defendant then driving the same, whereby the said horses then ran against the said plaintiff while she was so walking in said highway, and without any fault on her part, knocked her down, and thereby then causing a fracture of , and badly bruising and wounding her, and other injuries to her then and there did to her damage $.

Wherefore she prays judgment against said defendant for said sum of $, her damages so sustained.

The above is from the case of Pendleton Street R. R. Co. *v.* Shires, 18 Ohio St. 255. To this there was an answer of a page and a half of printed matter, when a single paragraph, denying the *negligence*, was all that was necessary. The answer is filled with admissions, a kind of pleading not *allowed* by the code. The only answer the code admits of is either a *denial* of some or all the averments in the petition, or the statement of new matter constituting a defense, counter-claim, or set-off. A jury can never tell what such an answer puts in issue.

In this case the court ruled that the charge was erroneous, because it seemed to imply an obligation on the company to exercise the highest degree of care, and to employ the very best possible well-known means and appliances in respect to their teams and cars, to insure the safety of the general public. If it had been a *passenger* on one of their cars that was injured, the charge would have been well enough; but as to the case of an individual of the general public, toward whom the company occupied no relation arising out of contract, express or implied, the rule is different, and is thus laid down in Clev., Col. & Cin. R. R. Co. *v.* Terry, 8 Ohio St. 570: "The degree of care required in such cases of employes" (of the company), "and also of the party injured, is merely ordinary care and prudence, the perils to be encountered, and all other circumstances under which the injury was inflicted and received, being considered."

This form will answer for merely running against one by omitting all about the excavation, etc.

177. INJURING PASSENGER.

The said A B, plaintiff, complains of the said , a corporation duly organized under the law of the State of , defendant, for that the said defendant, on the day of , A. D. 18 , owned and used a certain railroad, leading from to , in the State of , and of certain cars and locomotives running thereon, and was thereby engaged in the business of common carriers of passengers and their baggage over its said line of railroad; and that on the said day of , A. D. 18 , the said plaintiff was a passenger on one of the trains and cars of said defendant, going from to , in said State of , with his baggage;* and that said defendant, by its agents and servants, so carelessly, negligently, and unskillfully and improperly managed and conducted said train and cars that the said train and cars ran with great violence into and against a train and cars of said de-

fendant, coming on said track from an opposite direction, and thereby smashed and broke said cars in said train, and thereby injured the said plaintiff by said collision and broke, (*here set out the injuries sustained,*) and other wrongs and injuries then and thereby inflicted on the plaintiff to his great damage $.

Wherefore he prays judgment against said defendant for said sum of $, his damages so sustained.

W T, Attorney for Plaintiff.

178. WHEN NEGLIGENCE OF OTHER TRAIN.

(*Follow the last form to *, and proceed:*) and the said plaintiff further saith that another train and cars of said defendant was at the same time running on the track of its railroad in an opposite direction to the train on which said plaintiff was going, and that said defendant, by its agents and servants, so carelessly, negligently, and improperly managed and conducted said train and cars coming in the opposite direction to the train and cars on which said plaintiff was riding, that the train and cars so coming toward the train and cars on which plaintiff was riding, by said carelessness, negligence, and improper conduct, ran against and into the said train and cars on which said plaintiff was then riding, and broke and smashed said cars, and threw some of them from the track, and thereby injured the said plaintiff in this, to wit: (*here set out the injury and extent of it, with any special damage sustained, as the fact may be,*) and other injuries then and there inflicted by said collision on and to the said plaintiff; to his damage $.

Wherefore he prays judgment against said defendant for said sum of $, his damages so as aforesaid suffered and sustained.

A B, Attorney for Plaintiff.

179. INJURY TO ONE NOT ON TRAIN.

The said A B, plaintiff, complains of the , a corporation duly organized under the laws of the State of , defendant, for that the said defendant owned and used a certain railway, with its locomotives and cars, running from to , in said State of , before and at the time of the committing the grievances hereinafter set forth, and was accustomed and did in fact run its locomotives and cars over said line of railway, in trains carrying passengers or freight, and otherwise; and that on the day of , A. D. 18 , the said plaintiff was going with a wagon and team of horses along the road leading from to , and which road crossed the track of said railroad at , in said

county of ; and that the said defendant, by its agents and servants, so carelessly, negligently, and improperly managed and conducted its trains going on said road that, by reason of such carelessness, negligence, and improper management, the locomotive and cars of said defendant ran against and over the horses and wagon of said plaintiff as the same were being driven across the track of said railroad, at the said place, and then thereby, without any fault on the part of the plaintiff, killed said horses, broke in pieces said wagon, and greatly injured said plaintiff in this, to wit, (*here state any injury received by the plaintiff.*) whereby and by reason of which said plaintiff was disabled and laid up, unable to attend to his usual business for the space of days, and was compelled to employ surgeons and physicians to attend upon him at a great expense; and other wrongs were then there done by said defendant to said plaintiff; to his damage $.

Wherefore he prays judgment against said defendant for said sum of $, his damages so as aforesaid sustained.

E F, Attorney for Plaintiff.

These forms will cover most of the cases of injuries to passengers and third persons. The law is being settled by numerous cases in England and in this country. Among the cases are the following, which establish the doctrine of the greatest care for the safety of passengers, and ordinary care toward persons not on the train: Pendleton Street R. R. Co. *v.* Shires, 18 Ohio St. 255; Cleveland, Columbus & Cincinnati R. R. Co. *v.* Terry, 8 Ohio St. 570; Trow *v.* Vermont Central R. R. Co., 24 Vt. 497; Kerwhacker *v.* C. C. & C. R. R. Co., 3 Ohio St. 172; Same *v.* Keary, 3 Ib. 201; Same *v.* Elliot, 4 Ib. 474; Tracy *v.* Troy & Boston R. R. Co., 38 N. Y. 433; Bradley *v.* Buffalo, N. Y. & Erie R. R. Co., 34 N. Y. 427.

Dwight, J., in Gonzales *v.* N. Y. & H. R. R. Co., 38 N. Y. 440, says: "The rules of law, applicable to this case, must be considered as settled, to wit: *First.* That the party seeking to recover for injuries occasioned by the negligence of another, must be shown to be free from negligence contributing in any degree to occasion the injury complained of.

"*Second.* That a person attempting to cross the track of a railroad must make use of his ordinary faculties to ascertain if there is danger in the attempt, or he will be guilty of negligence. Ernst *v.* Hud. Riv. R. R. Co., 36 How. 84; Wilcox *v.* Rome & Watertown R. R. Co., 39 N. Y. 358.

"*Third.* That the question of negligence, the facts being uncontroverted, is a question of law for the court.

"Brown *v.* N. Y. Central R. R. Co., 34 N. Y. 397; Sullivan *v.* Same, 34 Ib. 29; Beisiegel *v.* Same, 34 Ib. 622; Ernst *v.* Hud. Riv. R. R. Co., 35 N. Y. 9; Wilds *v.* Hud. Riv. R. R. Co., 29 N. Y. 325; Mackey *v.* N. Y. Central R. R. Co., 35 N. Y. 75; Steves *v.* O. & S. R. R. Co., 18 N. Y. 422; 37 N. Y. 287; 40 N. Y. 9, 145; 39 N. Y. 34, 227, 358; 34 N. Y. 404; L. R., 3 Q. B. 549; 17 N. Y. 362; 29 N. Y. 315; 34 Ib. 622; 94 Eng. C. L. 881, where gross neglect is defined; L. R., 2 Q. B. 264; L. R., 2 C. B. 371; L. R., 1 C. B. 53; Tunney *v.* Midland R. R. Co., L. R., 1 C. B. 291; L. R., 1 C. B. 300; Lunt *v.* London & Northwestern R. R. Co., L. R., 1 Q. B. 277; L. R., 1 House of Lords, 95; L. R., 1 Exch. 21, 239, 265; 24 Law & Eq. 122; L. R., 3 Exch. 114; L. R., 2 C. B. 631; L. R., 3 C. B. 216, 326, 368; L. R., 3 Q. B. 555, 733; 100 Eng. C. L. 765, 568; 96 Ib. 168; 96 Ib. 714; 18 Ohio St. 399. These two last cases relate to children injured. Negligence can not be imputed to a child. 44 N. Y. 459; 1 Q. B. 29; 31 Penn. St. 358, 372; 12 Wright, (Penn.) 223; 57 Penn. St. 172, 187; Crippen *v.* N. Y. Cen. R. R. Co., 40 N. Y. 34; Hulbert *v.* N. Y. Central, 40 N. Y. 145; Buffett *v.* Troy & Boston R. R. Co., 40 N. Y. 168; Button *v.* Hud. Riv. R. R. Co., 18 N. Y. 248; Holbrook *v.* U. & Sch. R. R. Co., 12 N. Y. 236; Nichols *v.* Sixth Av. R. R. Co., 38 N. Y. 131; Webster *v.* Hud. Riv. R. R. Co., 38 N. Y. 260; Tracy *v.* Troy & Boston R. R. Co., 38 N. Y. 433; 85 Eng. C. L. 849; 94 Ib. 573; L. R., 3 H. of L. 330; L. R., 3 C. B. 495; L. R., 3 Exch. 146, 150, 189; 37 N. Y. 210, 289. Some of these cases are on negligence in other than railroad cases. Muhl, Adm'r, *v.* The Mich. Southern R. R. Co., 10 Ohio St. 272; C. & P. R. R. Co. *v.* Sutherland, 19 Ohio St. 151; L. R., 3 C. B. 368."

180. EXPELLING PASSENGER FROM THE CARS.

The said A B, plaintiff, complains of the said , for that the said is a corporation duly organized under the laws of , for the purpose of constructing and running a railroad from to , in said State of , and that before the committing of the wrongs and grievances hereinafter stated, owned and used said railroad running from to , in State of , with its locomotives and cars, as a common carrier of freight and passengers over said line of railroad; and that said plaintiff, on the day of , A. D. 18 , bought a ticket from the agent of said defendant, authorizing him as a passenger to pass over said road in the cars of the defendant from to , and that,

as such passenger, said plaintiff entered the cars of said defendant as a passenger and took his seat therein; yet the said defendant, by its agents and servants, disregarding its duties as such common carrier of passengers, did, before the cars of said defendant had reached the end of said journey, to wit, at , on the line of said road, wrongfully, forcibly, and unlawfully force and expel the said plaintiff from the cars of said defendant, and refused the said plaintiff permission further to ride in said cars of said defendant, and left said plaintiff there without having completed his said journey, whereby he was greatly delayed in his business, and other wrong then and there wrongfully, forcibly, and unlawfully did to said plaintiff; to his damages $.

Wherefore he prays judgment against said defendant for said sum of $, his damages so as aforesaid sustained.

E T, Attorney for Plaintiff.

The law in regard to the expulsion of passengers will be found stated and enforced in the following cases: Hibbard *v.* N. Y. & Erie R. R. Co., 15 N. Y. 455; Commonwealth *v.* Power, 7 Metcalf, 596; Hall *v.* Power, 12 Ib. 482; Nellis *v.* N. Y. Central, 30 N. Y. 505; Little Miami R. R. Co. *v.* Wetmore, 19 Ohio St. 110; Pitt., Ft. W. & Chicago R. R. Co. *v.* Slusser, 19 Ohio St. 157; Atlantic & Great West. R. R. Co. *v.* Dun, 19 Ohio St. 162. Corporations are liable to punitive damages, as an individual would be, for the conduct of its servants within the scope of their authority. The court, in the case last cited, say: "The foundation principle, which governs these cases, it seems to us, is found in the maxim, *qui facit per alium, facit per se.* The act of the servant, done within the scope and in the exercise of his employment, is in law the act of the master himself. And this legal unity of the principal and agent, says the Supreme Court of Mississippi, in New Orleans, Jackson and Great Northern R. R. Co. *v.* Bailey, 40 Miss. 453, in respect to the wrongful or tortious, as well as to the rightful acts of the agent, done in the course of his employment, is an incident, which the law has wisely attached to the relation from its earliest history." Phila., Wilm. & Balt. R. R. Co. *v.* Quigley, 21 How. U. S. 202; Hopkins *v.* Atlantic & St. Law. R. R. Co., 36 N. H. 9. Where the agent acts outside of his authority, the corporation is not liable. Little Miami R. R. Co. *v.* Wetmore, 19 Ohio St. 110; Higgins *v.* W. T. & R. R. Co. 46 N. Y. 23.

181. LOSS OF LUGGAGE OR BAGGAGE.

The said A B, plaintiff, complains of said , defendant, for that the said defendant is a corporation duly organized under the laws of the State of , and were common carriers of passengers and their luggage, from to , by railway, (or, *by steamship*, or, *in part by steamship and in part by railway, giving the termini of each*,) and that the plaintiff, for reward therefor paid by plaintiff to the defendant, became and was a passenger on the cars of said defendant, and at the request of the defendant, to be by said defendant, as such common carriers, safely and securely carried by the same, on the railroad and cars of defendant, with his baggage or luggage, from to , and to have his said baggage or luggage taken due care of by said defendant for the purpose aforesaid, while the same should so remain in possession of said defendant, and to be delivered to him on his arrival on said railroad and cars at said ; and the plaintiff avers that he has performed all conditions precedent on his part to be performed; yet the said defendant, disregarding his duty in that behalf, failed to deliver to said plaintiff, at aforesaid, his said baggage, or luggage, to wit, (*here state what the baggage was in detail, as far as possible*,) one trunk, with its contents, consisting, to wit, of (*here state contents as far as possible*,) and various articles necessary and convenient for a person traveling, of great value, to wit, of the value of $, and the same became and were wholly lost to said plaintiff; to his damage $.

Wherefore he prays judgment against said defendant for said sum of $, his damages so as aforesaid sustained.

E T H, Attorney for Plaintiff.

Vide L. R., 1 Q. B. 54, Le Conteur *v.* Lond. & S. W. R. R. Co.; Richards *v.* G. Br. & South Coast R. R. Co., 7 C. B. 830; Peninsular & Oriental Steam Nav. Co. *v.* Shand, 13 Weekly Rep. 1049; Brandley *v.* Southeast R. R. Co., 12 C. B., N. S. 63; Pianiani *v.* Lon. & G. W. R. R. Co., 18 C. B. 226; Belfast & Bal. R. R. Co. *v.* Keyes, 9 H. L. Cas. 556.

It is an elementary principle in the law that the carriers of passengers are liable as common carriers for their ordinary baggage, or, as it is more commonly called in English books, luggage. And it is considered that, as railways have made their checks evidence in regard to the delivery of baggage, the possession of such check by a passenger is evidence against the company of the receipt of the

baggage. In one case, the court say, "it stands in the place of a bill of lading." Redfield on R. R., 242, sec. 128. And where different railways, forming a continuous line, run their cars over the whole line, and sell tickets for the whole route, and check baggage through, an action lies against either company for the loss of the baggage. Harte *v.* Ren. & Sarato. R. R. Co., 4 Selden, 37; Stratton *v.* N. Y. & N. H. R. R. Co., 2 E. D. Smith, 184.

Vide also Brooke *v.* Pickwick, 4 Bing. 218; Hawkins *v.* Hoffman, 6 Hill, (N. Y.) 586; Bennett *v.* Dutton, 10 N. H. 481; Powell *v.* Myers, 26 Wend. 591; 7 Rich. 158, 162; 13 Wend. 611; Robinson *v.* Dunmore, 2 Bos. & Pul. 416; Clarke *v.* Gray, 6 East, 564; 4 Esp. 177; Dill *v.* Railway Co., 7 Rich. 158; Jordan *v.* The Fall River R. R. Co., 5 Cush. 69; Butcher *v.* L. & S. W. R. R. Co., 29 Eng. L. & Eq. 347; Tower *v.* Utica & Sch. R. R. Co., 7 Hill, 47; Richards *v.* Lond. B. & South Coast R. R. Co., 7 C. B. 839; Cohen *v.* Frost, 2 Duer, 335; Steam Cr. Palace *v.* Vanderpool, 16 B. Mon. 302, 308; East Ang. R. R. Co. *v.* Lythgoe, 10 C. B. 726; 2 Eng. L. & Eq. 331; Cowley *v.* Parsons, 12 C. B. 291; 6 Eng. L. & Eq. 397; Cuthbertson *v.* Parsons, 12 C. B. 304; 10 Eng. L. & Eq. 521. If the passenger assumes the care of his own baggage, the carrier is not liable. White *v.* Winnisimmet Co., 7 Cush. 155; Wilson *v.* Hamilton, 4 Ohio St. 722; Fisher *v.* Clisby, 12 Ill. 344; Woods *v.* Devin, 13 Ill. 746; Richards *v.* Fuqua, 28 Miss. 792; Logan *v.* Pontchartrain R. R. Co., 11 Rob. (La.) 24; Wright *v.* Caldwell, 3 Mich. 51; Young *v.* Smith, 3 Dana, 91; Marshall *v.* York, Newcastle & Berwick R. R. Co., 7 Eng. L. & Eq. 519; Wilson *v.* Grand Trunk Railway, 57 Maine, 138; S. C., 1 Am. 26; Mayall *v.* Boston & Maine R. R., 19 N. H. 122; Elkins *v.* Bos. & Maine R. R., 23 N. H. 287; Wilson *v.* Grand Trunk Railway, 56 Maine, 60; Collins *v.* Bos. & Maine R. R., 10 Cush. 507; Elvira *v.* Harbeck, 2 Blatch. 339.

182. SAME IN ANOTHER FORM.

The said A B complains of the said , for that the said defendant, before and at the time of the committing of the grievances hereinafter mentioned, was a corporation duly organized under the laws of the State of , for the construction and running of a railroad, and was the owner and proprietor of a certain railway running from to , in said State of , and of certain carriages, cars, and locomotives used by it, for the carriage and conveyance of passengers, goods, and chattels in, upon, and along said railway from to , as aforesaid, for hire and reward to it to be paid in that behalf, and thereupon the said plaintiff,

heretofore, to wit, on the day of , A. D. 18 , at the request of the said defendant, became and was a passenger, for value duly paid by said plaintiff to said defendant, (or, *by E F duly paid for said plaintiff to said defendant,*) on one of the cars or carriages of said defendant, to be by it safely and securely carried and conveyed thereby, together with his luggage, or baggage, on a certain journey along and on said railway, to wit, from to ; and the said defendant then and there received said plaintiff as such passenger as aforesaid, together with his baggage, or luggage, to wit, a certain portmanteau, (or, trunk, etc.) containing divers goods of the said plaintiff, to wit, (*here set out the specific goods, clothing, etc., contained therein,*) and thereupon it became and was the duty of said defendant to use due and proper care that the said plaintiff and his luggage, or baggage, should be safely and securely carried and conveyed by, upon, and along said railway as aforesaid, from said to said ; yet the said plaintiff avers that said defendant, disregarding its duties in that behalf, did not use due and proper care in that behalf, and that by the carelessness, and negligence, and default of said defendant, its agents and servants, the said luggage, or baggage, was not delivered to said plaintiff on arrival at said ; but the same, by such carelessness, negligence, and default of said defendant, its agents and servants, became and was wholly lost to the said plaintiff; to the damage of the said plaintiff $.

Wherefore said plaintiff prays judgment against said defendant for said sum of $, his damages so as aforesaid sustained.

W T, Attorney for Plaintiff.

Vide Wyld *v.* Pickford, 8 Mees. & W. 443; Pozzie *v.* Shipton, 8 Ad. & El. 963.

This form is copied from the report of the case of Marshall *v.* The York, Newcastle and Berwick Railway Co., 7 Eng. L. & Eq. 519. The plaintiff was a servant of Lord Adolphus Vane, who paid his fare. A question was made, whether an averment that the fare was paid by him would be a variance, and the court held it would not. I have suggested an averment to correspond with the fact, if the fare is paid by another. But I don't see any force in the objection; if paid by another, it was paid for him by such other and so paid by himself; nor can it make any difference, if the person paying was bound to pay for him, as it was the same, as though he paid for himself. The frame of this petition, say the court, is not founded upon a contract, but is to be regarded as an

action of tort against the defendant as a carrier, on the custom of the realm. It was also objected that there was no contract between plaintiff and defendant, since his master, Lord Vane, made all the contract there was made; but so far as plaintiff was concerned, Lord Vane was his agent to make the contract for the journey. If A takes B as his servant, and agrees to pay his fare on the journey, A is B's agent for that purpose, so that the contract is with the passenger and not with the party paying. A goes and buys several tickets for himself and others; it would be strange, if these others, had in law no contract for carriage with the company. This is often done; and the contract is with each severally. The company never inquire who is to use the tickets.

183. ENGINEER *v.* RAILROAD COMPANY FOR INJURY BY NEGLECT OF A SERVANT OF SAID COMPANY.

The said A B, plaintiff, complains of the Little Miami Railroad Company, defendant, for that, before and at the time of the committing of the grievances by the said defendant, hereinafter mentioned, the said defendant was possessed of a certain railway, running from Cincinnati to Springfield, in said State of Ohio, and of two locomotives, with the trains of railway cars thereto respectively attached; the one of said locomotives and the train thereto attached, running from said Cincinnati to said Springfield, and back again the ensuing day thereafter, and the other thereof, running from said Springfield to said Cincinnati, and back again the ensuing day, which said locomotives, with their respective trains, were used and accustomed to meet and safely pass each other at Plainville, by the express direction and arrangement of the said defendant; and the said plaintiff, at and before the time of the injury hereinafter mentioned, was employed by said defendant as an engineer upon one of the said locomotives, at and for a certain hire and reward agreed upon by the parties in that behalf, and was accustomed to stop the said last-mentioned locomotive at Plainville aforesaid, under the instruction by him received from the said defendant, through its duly appointed agents and servants, and there safely to pass the said other locomotive as aforesaid; and that, by reason of the premises, it became the duty of the said defendant, by its agents and servants, to give the said plaintiff timely and due notice of any change in the place of meeting and passing of the said locomotives and their respective trains; yet the said defendant, by its agents and servants, not regarding its said duty, did, by its agents and servants, on the day of , A. D. 18 ,

change the place of meeting and passing of said locomotives, with their respective trains, from said Plainville to Columbia, on the line of said railroad, and directed said change to be carried into effect on the day next following the said day of , A. D. 18 , and the said defendant, by its agents and servants, wholly neglected and failed to give the said plaintiff notice of the said change in the place for the passing of said locomotives, with their respective trains; whereby, whilst the said plaintiff was proceeding, in his capacity of engineer as aforesaid, on one of said locomotives, with the train thereto belonging, from said Cincinnati to said Springfield, to wit, on the day of , A. D. 18 , according to the directions before that time given to the said plaintiff by the agents and servants of the said defendant, and of the change of which the said plaintiff then had no notice, between Columbia and Plainville aforesaid, the other locomotive, with its train, coming from said Springfield toward said Cincinnati, unavoidably ran against and came in collision with the said locomotive, on which the said plaintiff was, in his said capacity of engineer, and violently crushed the same, whereby the said plaintiff was then and there severely scalded, bruised, hurt, and wounded, and in consequence thereof became sick, sore, lame, and disordered, and so remained for the space of months thence next ensuing; and was put to great expense in and about the endeavoring to cure the said hurts, bruises, wounds, and fractures, and did expend therefor the sum of $, and also, during all that time, was unable and thereby prevented from attending to his ordinary business, and lost all the wages he otherwise would have earned as such engineer, to wit, the sum of $; to the damage of the said plaintiff $.

Wherefore he prays judgment against the said defendant for the said sum of $, his damages so as aforesaid sustained.

This is substantially a copy of the declaration in the case of Little Miami Railroad Co. *v.* Stevens, 20 Ohio, 415. If the case is to be followed, it may be useful to the profession. The case, however, is one of purely judicial legislation; the authorities being nearly all against the decision. See the cases referred to in the dissenting opinion of Spaulding, J. The same doctrine has since been reaffirmed in New York, Massachusetts, South Carolina, and England. Coon *v.* S. & U. R. R. Co., 1 Selden, 492; Hayes *v.* W. R. R. Co., 3 Cush. 270; Skip *v.* Eastern R. R. Co., 24 Eq. & L. 396; Wigmore *v.* Jay, 5 Exch. 354; Hutchinson *v.* York & Newcastle R. R. Co., 5 Exch. 343. The same doctrine was applied to

hands in a manufacturing company. Albro *v.* Agawam Canal Co., 6 Cush. 75. The next form shows when the company are liable; and it may be that it can be maintained that the change of time was a corporation act, for which the company may be liable. The distinction is nice, but yet real. Where the agent is following the instructions of the company, and through negligence injures another, then the company is not liable; but when the accident happens, not from the negligence of the one doing the act, but from an act of negligence traceable to the company, then the company is liable. In the Stevens case, this change of time may be considered a corporation act; if it was, then it was the duty of the company to give the notice; and having failed to give it, it was responsible for the accident. 1 McMullen, 385.

The question involved in the case of Little Miami R. R. Co. *v.* Stevens, 20 Ohio, 415, has been under consideration in two subsequent cases. In C. C. & C. R. R. Co. *v.* Keary, 3 Ohio St. 201, it was held that where a railroad company places one person in its employ under the direction and control of another also in its employ, such railroad company is liable for an injury sustained by the person placed in subordinate situation, by the negligence of his superior. In the Pitts., Ft. W. & Chicago R. R. Co. *v.* Devinney, 17 Ohio St. 197, the court held that where in a collision of two trains on same road, by the negligence of the conductor of one of the trains a brakesman on the other train was injured, the company was not liable.

Brinkerhoff, J., in this case said: "A comprehensive summary of the branch of the law applicable to this question, as settled by cases so uniform and numerous that it is needless to cite them, in England, New York, Massachusetts, Pennsylvania, and most of the other states of the Union, is thus stated by Read, J., delivering the opinion of the Supreme Court of Pennsylvania, in Caldwell *v.* Brown, 6 Am. L. Register, N. S. 752: 'A servant, by entering into his master's service, assumes all the risks of that service, which the master can not control, including those arising from the negligence of his fellow-servants. In case of an injury to one servant by the negligence of another, it is immaterial, whether he who causes, and he who sustains the injury, are or are not engaged in the same or similar labor, or in the position of equal grade, or authority. If they are acting together, under one master, in carrying out a common object, they are fellow-servants. The master, indeed, is bound to use ordinary care in providing suitable

structures, engines, tools, and apparatus, and in selecting proper servants, and is liable to other servants in the same employment, if they are injured by his own neglect of duty. But it makes no difference whether the master is an individual, or a corporation; in either case he is responsible to his own servants for his own neglect, but not for that of their fellow-servants.' But on this general doctrine, a single exception has been ingrafted in this state; first, by a divided court in Little Miami R. R. Co. *v.* Stevens, 20 Ohio, 415, and afterward by a full court in C. C. & C. R. R. Co. *v.* Keary, 3 Ohio St. 201, and thenceforward recognized by this court in subsequent cases." The court admit the Ohio rule is in opposition to all authority outside of Ohio, save a single case in Wisconsin. Chamberlain *v.* Mil. & Miss. R. R. Co., 11 Wis. 239. The English cases are uniform on this question. In Tunney *v.* Midland R. W. Co., L. R., 1 C. B. 291, Erle, C. J., says: "The rule has been settled by a series of cases beginning with Priestly *v.* Fowler, 3 Mees. & Wels. 1, and ending with Morgan *v.* The Vale of Neath R. R. Co., L. R., 1 Q. B. 149, that a servant, when he engages to serve a master, undertakes, as between himself and his master, to run all the ordinary risks of the service, including the risks of negligence upon the part of a fellow-servant when he is acting in the discharge of his duty as servant of him who is the common master of both." Walker *v.* S. Eastern R. R. Co., 2 H. & C. 102; Lovegrove *v.* The London & Brighton R. R. Co., 16 C. B., N. S. 669; Gilshannon *v.* Stony Brook R. R. Co., 10 Cush. 228; Farwell *v.* B. & W. R. R. Co., 4 Metcalf, 49; Bartonshill Coal Co. *v.* Reid, 3 Macq. 266; Bartonshill Coal Co. *v.* McGuire, 3 Macq. 300; Wiggot *v.* Fox, 11 Exch. 832; Senior *v.* Ward, 1 E. & E. 391; Mad River & Lake Erie R. R. Co. *v.* Barber, 5 Ohio St. 541.

184. ENGINEER *v.* RAILROAD COMPANY FOR INJURY FROM USING A CONDEMNED LOCOMOTIVE.

The said A B, plaintiff, complains of the Western Railroad Corporation, for that the said defendant, before and at the time of the committing of the grievances hereinafter mentioned, was the owner of a certain railroad, and of a carriage commonly called a locomotive, moved and propelled by steam, and by the said defendant used and employed in carrying and conveying passengers and goods, (*or may not this be preferred*—hauling trains of cars, holding and containing passengers and goods,) upon and over the said railroad of the said defendant, from Greenbush, in the county of Albany, to Boston, in the State of Massachusetts, and intermediate

places; that the said plaintiff, on the first day of December, A. D. 1845, at Greenbush aforesaid, at the time of the committing of the said grievances, was in the employment of the said defendant, as fireman upon said locomotive, so moved and propelled by steam as aforesaid; and that it then and there became, and was the duty of the said defendant to procure a good, safe, and secure locomotive, with good, safe, and secure machinery and apparatus, to move and propel the same by means of steam as aforesaid; yet the said defendant, not regarding its duty in that behalf, conducted so carelessly, negligently, and unskillfully, that, by and through the carelessness, negligence, and default of the said defendant and its servants, in providing, using, and suffering to be used, an unsafe, defective, and insecure locomotive, and for want of due care and attention to its duty in that behalf, on the said day of aforesaid, and whilst the said locomotive was in the use and service of the said defendant upon the said railroad, and whilst the said plaintiff was on the same, in the capacity aforesaid for the said defendant, the boiler connected with the engine of the said locomotive, by reason of the unsafeness, defectiveness, and insecurity thereof, exploded; whereby large quantities of steam and water escaped therefrom and fell upon the said plaintiff, by which he was greatly scalded, and injured, etc. (*state any special damages, and conclude as in the preceding forms.*)

This is a copy of the declaration or petition in the case of Keegan *v.* The Western Railroad Corporation, 4 Selden, 175. The form might be somewhat improved possibly and shortened; but it contains all that is necessary to make a good case on paper.

In this case, it was held that the defendant was liable, on the ground that the neglect was that of the corporation, and not of its servants, and so did not come within the principle established in Coon *v.* S. & U. R. R. Co., 1 Seld. 492. The locomotive in this case had been reported as insufficient for service by the engineers, but the corporation continued to use it; hence it was the default of the corporation, and not of its servants. These had done their duty in reporting its insufficiency. The court says, as to the cases cited where railroads had not been held liable for an injury to one servant, arising from the negligence of another: "They are applicable only where the injury complained of happened without any actual fault or misconduct of the principal, either in the act which caused the injury, or in the selection and employment of the agent by whose fault it did happen. Whenever the injury results

from the actual negligence or misfeasance of the principal, he is liable as well in the case of one of his servants as in any other. But where the injury results from the actual fault of a competent and careful agent, (as may sometimes happen,) the fault, when the injury falls upon another servant, will not be imputed to the principal, as it will where the injury falls upon a third person; as, for instance, on a passenger on a railroad. In the case of passengers, the actual fault of the agent is imputed to the principal on grounds of public policy; in the case of a servant it is not. The reason for this distinction may be found in the cases cited by appellant's counsel. But it is unnecessary to state them here, because the injury in the present case is found to have resulted directly from the negligence or misconduct of the defendants themselves, in continuing to use an engine having a defective and dangerous boiler, after notice of its dangerous condition."

The question, what would be the effect of a knowledge by the plaintiff of the defective character of the boiler upon his right to recover, is left an open one; though the language of the court would seem to imply that, if he had this knowledge, it would change his rights. It should not certainly. The company would have a right to discharge a servant who refused to go on its order, and hence it ought to be responsible to the same extent as if the defect of the boiler was not known to the plaintiff. 5 Ohio St. 541.

185. MAIL-AGENT *v.* RAILROAD COMPANY.

The said A B, plaintiff, complains of the said C D, defendant, for that the said defendant is a corporation, engaged in carrying passengers and freight from to , by railroad; and that the said defendant had entered into a contract with the United States, by which, for a stipulated price and period, the said defendant agreed to transport, upon the said railway of the said defendant, and in the cars thereof, the mail and mail-agent of the said United States; and the said plaintiff saith that he was the mail-agent of the said United States on the said route, and in the employ of the same; and that, on the day of June, A. D. 18 , the said defendant, in pursuance and in consideration of the said contract of the said defendant with the said United States, received the said plaintiff as such mail-agent into one of the cars of the said defendant, so running on the railway aforesaid; and the said plaintiff, for the purpose and consideration aforesaid, became and was a passenger in said cars, to be thereby, and by the said defendant, safely, and with due care and caution, carried and con-

veyed from the said town (or, city) of to the said town (or, city) of , and which the said defendant then undertook and was bound to do; and yet the said defendant, not regarding the duty of the said defendant in that behalf, did not, nor would safely and with due care and skill, carry the said plaintiff as such passenger, but on the contrary thereof, so carelessly, unskillfully, and improperly managed in that behalf, that afterward, and while the said car was proceeding from the said town (or, city) of to the said town (or, city) of , and while the said plaintiff was such passenger therein, the said car, by and through the defectiveness and insufficiency of the same, and of the construction and material thereof, or of the engine and tender, or of some one of the cars of the train to which the said car was attached, and by and through the carelessness, unskillfulness, and improper conduct and default of the said defendant, and the said defendant's officers, agents, and servants in that behalf, and in the running, managing, and conducting of the car, and train, and engine drawing the same, was broken in pieces and thrown off the railroad track, and thereby then and there the ribs and bones of the said plaintiff, and the parts adjacent thereto, became and were dislocated, bruised, fractured, and broken, and he, the said plaintiff, was otherwise greatly injured; to the damage of the said plaintiff $.

The said plaintiff therefore prays judgment against the said defendant for the said sum of $, his damages as aforesaid sustained.

This is a copy of the petition in the case of Nolton *v.* The Western Railroad Corporation, 10 Pr. 97; and that was copied from the declaration in the case of Collett *v.* The London and Northwestern Railway Co., 6 Eng. L. & Eq. 305. In both these cases it is held that the company are liable for an injury to a mail-agent, as well as to any other passenger. *Vide* also Levy *v.* Langridge, 4 Mees. & Welsb. 337.

186. AGAINST RAILROAD FOR KILLING CATTLE.

The said A B, plaintiff, complains of the said C D, defendant, for that the said defendant, before and at the time of the committing of the grievances hereinafter mentioned, to wit, on the day of , A. D. 18 , was the owner and occupier of a certain railroad leading from to , and of certain cars and a locomotive running thereon, and the said plaintiff further saith that he was then the owner and possessed of certain cattle, to wit,

of five cows and two oxen (or any other stock, *as the case may be,*) of the value of $, and which cows and oxen casually, and without the fault of the said plaintiff, strayed in and upon the track and ground occupied by the railroad of the said defendant; and the said plaintiff further saith that the said defendant, by its agents and servants, not regarding its duty in that respect, so carelessly and negligently ran and managed the said locomotive and cars that the same ran against and over the said cows and oxen of the said plaintiff, and killed and destroyed the same; to the damage of the said plaintiff $.

The said plaintiff therefore prays judgment against the said defendant for the said sum of $, his damages so as aforesaid sustained.

The law has been generally settled that railroad companies are not liable for injury to cattle killed while trespassing on the road. The neglect on the part of the plaintiff, in suffering his cattle to be at large, precludes him from recovering, as the first fault is his. Munger *v.* Tonawanda R. R. Co., 4 Comst. 349; Clark *v.* S. & U. R. R. Co., 11 Barb. S. C. 112; Vandergrift *v.* Eastern R. R. Co., 29 Maine, 307; Tonawanda R. R. Co. *v.* Munger, 5 Denio, 255; Town *v.* Cheshire R. R. Co., 1 Foster, (N. H.) 363; Quimby *v.* Vermont Central R. R. Co., 23 Vt. 393; Trow *v.* Vermont Central R. R. Co., 24 Ib. 487; Brooks *v.* N. Y. & E. R. R. Co., 13 Barb. 524. In Michigan it has been held, it is believed, that an owner of cattle killed could not recover, even if killed by negligence. In the case of Kerwhacker *v.* Cleveland, Columbus and Cincinnati R. R. Co., 3 Ohio St. 172, it seems to have been intimated that the railroad company would be liable in any case; since in Ohio no person was bound to fence against cattle. This last doctrine is in direct conflict with repeated decisions made in Common Pleas and Supreme Court, on the circuit, as is known to us. This case was rightly decided, since the court below held the defendant was not liable even for a careless killing. Some cases go that far, but they are clearly wrong. In Cleveland, Columbus and Cincinnati R. R. Co. *v.* Elliot, 4 Ohio St. 476, the Supreme Court qualified the doctrine stated in the previous case, holding the railroad only to diligence in running its train. If stock are on the track, as that is only a remote cause of the injury, the owner can recover, if his cattle have been killed by negligence. Where the owner of cattle is bound to fence against the track, he can not recover for cattle killed on it, unless it was done willfully, or by gross carelessness. 4 Ohio

St. 424. Even if the plaintiff is in such case guilty of violating his contract in not erecting the fence, still the railroad company has no right willfully, or by gross negligence, to destroy his property. He would be liable to the company for any injury sustained from a refusal on his part to fulfill his contract.

The case in 3 Ohio St. 172 was rightfully decided, since the court below clearly charged the law wrong, when it said that the defendant was not bound to exercise any care whatever to avoid killing the cattle. Some of the cases go that far, but they are clearly wrong. These cases assume that where there is neglect on the part of the plaintiff he can not recover. This is true, where that neglect is connected with the immediate injury; as where the road is out of repair, or a nuisance is erected, a party must avoid it if he can; he can not be permitted voluntarily to cast himself upon an obstruction, where he can by ordinary care avoid it. Hogg *v.* Zanesville C. & M. Co., 5 Ohio, 410, 418. But the negligence in these cases is not of that character; it has nothing to do with the immediate injury, and the rule, therefore, does not apply. The rule is very well stated in Hess *v.* Lupton, 7 Ohio (pt. 1.) 216. If one leave an open pit in an uninclosed lot in a town, into which his neighbor's beast falls and perishes, an action lies; but if such an accident happen in a pit left open in a place remote from the haunts of cattle, no suit is sustainable, for the risk of doing mischief is so small that the exposure is not *negligent*. Or, to put the case in another form: has one a right to kill his neighbor's cattle because he finds them trespassing on his inclosure? We think no case can be found for such a proposition. If an individual has not the right, no more has a railroad company. Hence, it is clear that a railroad company are bound to exercise every reasonable care to avoid killing cattle found on their track. If the *owner* were to turn his cattle on the track, then he ought not to recover, because it is his own fault, or rather crime, in exposing them to the danger; and to allow him to recover under such circumstances would be to pay a premium for a willful violation of duty, at the hazard, too, of destroying the lives of those traveling upon railroads. The safety of the traveling public is a matter of as much importance as the value of cattle; and to allow cattle to be on the track of a railroad is a crime, since it endangers the lives of those who work and travel on it. To enable a party to recover, the cattle must have *strayed* on the road; the negligence, if any, must be remote; and then the agents of the company must avoid injuring them, if it can be done by the use of ordinary care and

diligence. Here again the public have an interest; as in running over them the train is liable to be thrown off the track; hence, every inducement should be held out to prevent a collision; and a liability on the part of the company and the agents, to pay for cattle killed, will tend to induce caution and care on the part of conductors and engineers. And it seems that this doctrine has been maintained in some cases. Quimby *v.* Vermont Central R. R. Co., 23 Vt. 393; Fawcett *v.* The York & N. M. R. R. Co., 2 Eng. L. & Eq. 289.

Where, however, the law requires a railroad company to keep up cattle-guards and fences, and they neglect to do so, they are liable, even if the cattle are abroad by the negligence of the owner, under such circumstances as to render their access to the road probable. Fawcett *v.* The York and North Midland R. R. Co., 2 Eng. Law & Eq. 289; Quimby *v.* The Vermt. Central R. R. Co., 23 Vt. 393; Trow *v.* Same, 24 Ib. 487. So where the owner of land agreed to keep up a fence, as well as the railroad, he can not recover for injury to his cattle if he fails to do so, as well as the railroad company, unless there is gross negligence on the part of the railroad agents. Talmadge *v.* R. & S. R. R. Co., 13 Barb. 493; Suydam *v.* Moore, 8 Barb. S. C. 358; Waldron *v.* R. & S. R. R. Co., Ib. 390. But if the owner permits his cattle to run upon the road, he can not recover, even if the company is required to keep up the fence. Clarke *v.* S. & U. R. R. Co., 11 Barb. S. C. 112; 5 Kan. 167.

Such we believe to be the correct view of the law; and it may be briefly summed up in the following propositions:

Where the company is bound to fence, and has not done it, then it is liable in all cases, unless the owner knowingly permits his cattle to be upon the road; and then, if they are killed by gross negligence. Where the company is not required to fence, then it is still liable where the cattle escape and stray upon the road, without the fault of the owner, if, by the use of ordinary care and caution, the accident might have been avoided; but where the owner allows his cattle to run at large, under such circumstances as render it probable that they will stray upon the road, then he can not recover at all; because to permit him to recover, would be to hold out a reward to a negligence endangering the lives of those who travel upon these thoroughfares. If the engineer kills them by carelessness, then both parties have been guilty of an act which ought to be punished as a crime; since its almost inevitable result is to endanger and destroy human life. A

person who lays a rail on the track is a criminal by law; and why? Because he willfully endangers human life. A person who knowingly permits cattle to stray upon the track also endangers human life; and why should he not be punished in degree? But to permit him to recover, if his cattle are killed, would be to reward him for his criminal negligence in endangering the lives of others. If the case lately decided by our court goes so far as to permit one to recover under such circumstances, then it is entitled to no respect, even in Ohio. 5 Ohio St. 541; 6 Ib. 105; 8 Ib. 239, 570.

187. AGAINST A RAILROAD AS A COMMON CARRIER.

The said A B, plaintiff, complains of the said C D, defendant, for that the said defendant, on the day of , A. D. 18 , owned and used a certain railroad, leading from the city of Troy to the village of Ballston, connected with the Schenectady and Saratoga Railroad, and the Washington and Saratoga Railroad, and owned, and used, and run upon the road of the said defendant, in connection with the railroad of the said S. and S. Railroad and the said W. and S. Railroad, passenger and baggage cars, for the carriage of passengers and their baggage to and from Whitehall to the said city of Troy for hire; and the said plaintiff saith that, on the day of , A. D. 18 , at said Whitehall, she paid to the said defendant the fare for the passage of herself and her children, and baggage, from the said village of Whitehall to the said city of Troy; and that her said baggage consisted of four parcels, containing clothing and bedding, and that one of said parcels was a trunk, and contained, with certain clothing, eighteen gold sovereigns, provided for the traveling expenses of the said plaintiff and her said children; and that the said plaintiff delivered the said baggage to the agents of the said defendant at said Whitehall, and the said defendant, by its agents, there received the same, and placed the same in a baggage-car of said defendant, to be carried to the said city of Troy; and the said plaintiff avers that she and her said children came to the said city of Troy in a passenger-car attached to, and drawn with, the said baggage-car over the said railroads from the said town of Whitehall to the said city of Troy; yet the said defendant, by its servants, so negligently, carelessly, and improperly conducted itself in this behalf, and in the carrying and taking care of said baggage, that two of the said packages—the said trunk with the said sovereigns therein, and another package—through the negligence and carelessness of the said de-

fendant, became and was wholly lost to the said plaintiff; to her damage, as she avers, $.

Wherefore the said plaintiff prays judgment against the said defendant for the sum of $.

This is prepared from the petition in the case of Hart *v.* The Rensselaer and Saratoga R. R. Co., 4 Selden, 37. It shows the liability of companies joining and running over roads belonging to several companies. It may be useful at times to have the reference and the form. 10 Ohio St. 65.

In the case of Fenner *v.* Buffalo and State Line R. R. Co., 44 N. Y. 505, the liabilities of railroad carriers were well considered. Erle, Comm'r, said: "It is well settled in this State that an intermediate carrier, one who receives goods to be transported over his route, and thence by other carriers to their place of destination, generally remains liable as a common carrier until he has delivered the goods to the next carrier. Miller *v.* Steam Nav. Co., 10 N. Y. 431; Gould *v.* Chapin, 20 N. Y. 266; Ladue *v.* Griffith, 25 N. Y. 364; McDonald *v.* Western Railroad Corporation, 34 N. Y. 497." This rule is restricted strictly to intermediate carriers, to carriers who are not to deliver to the consignee, but to another carrier, to be by it forwarded on to its final destination. The judge continues:

"From the drift of the decisions in this State, I think we may fairly infer the following rules as to the delivery of goods at their place of destination by a railroad carrier: If the consignee is present upon the arrival of the goods, he must take them without unreasonable delay. If he is not present, but lives at or in the immediate vicinity of the place of delivery, the carrier must notify him of the arrival of the goods, and then he has a reasonable time to take and remove them. If he is absent, unknown, or can not be found, then the carrier can place the goods in its freight house, and, after keeping them a reasonable time, if the consignee does not call for them, its liability as a common carrier ceases. If, after the arrival of the goods, the consignee has a reasonable opportunity to remove them, and does not, he can not hold the carrier as an insurer. The carrier's liability thus applied and limited, I believe will be found consonant with public policy, and sufficiently convenient and practicable. See Powell *v.* Myers, 26 Wend. 591; Fisk *v.* Newton, 1 Denio, 45; Jones *v.* Norwich & N. Y. Trans. Co., 50 Barb. 193; Roth *v.* Buffalo & State Line R. R. Co., 34 N. Y. 548." Hence where goods have reached their destination, notice

has been given to remove them and a reasonable time has passed for that purpose, or if no consignee can be found and they are stored, the railroad is not liable for their loss, if burned up after that, as insurers, but only as warehousemen.

A railroad company can not by express contract exonerate itself from liability for injuries or losses happening from its own neglect; it can by agreement exonerate itself from its common-law liability as an insurer. Welsh *v.* Pitt., Ft. W. & Chicago R. R. Co., 10 Ohio St. 65; Graham & Co. *v.* Davis & Co., 4 Ohio St. 362; Sayer *v.* Portsmouth, S. & P. & E. R. R. Co., 31 Maine, 228; N. J. Steam Nav. Co. *v.* Merchants' Bank, 6 How. U. S. 344; Chippendale *v.* L. & Y. R. R. Co., 7 Eng. L. & Eq. 395. This last case seems to be decided on an English statute. The following cases maintain the doctrine that common carriers can not by contract exempt themselves for losses occurring from their own negligence: Steinway *v.* Erie R. R. Co., 43 N. Y. 123; York Co. *v.* Cen. R. R. Co., 3 Wal. 107.

188. COMMON CARRIERS.

The said A B, plaintiff, complains of the said C D, defendant, for that the said defendant, before and at the time of the delivery of the goods hereinafter mentioned, was, and from thence hitherto hath been, and still is, a common carrier of goods and chattels for hire; and that the said plaintiff, whilst said defendant was such common carrier, to wit, on the day of , A. D. 18 , caused to be delivered to the said defendant, and the said defendant then accepted and received of and from the said plaintiff, the following goods and chattels (or, a box, or, boxes, containing divers goods and chattels,) to wit, (*here describe the goods, etc.,*) of the said plaintiff of great value, to wit, of the value of $, to be safely carried and conveyed from to , and there to be safely delivered for, (or, to, *as case is,*) the said plaintiff, for a certain reasonable reward to the said defendant in that behalf; yet the said defendant, not regarding his said duty as such common carrier, did not, nor would safely or securely carry or convey the said from to , as aforesaid, nor there, to wit, at , safely deliver the same for (or, to,) the said plaintiff; but on the contrary thereof, the said defendant so carelessly and negligently behaved and conducted himself in the premises that, by the carelessness and fault of the said defendant, the said , being of the value aforesaid, was then and there wholly lost to the said plaintiff; to the damage of the said plaintiff $.

Wherefore he prays judgment against the said defendant for the said sum of $, his said damages so as aforesaid sustained.

189. FOR NOT DELIVERING IN A REASONABLE TIME.

The said A B, plaintiff, complains of the said C D, defendant, for that, (*here insert from* 161 *the averment of being a common carrier,*) and the said plaintiff, on the day of , A. D. 18 , at the special instance and request of the said defendant, caused to be delivered to him, the said defendant, certain goods and chattels, (or, certain boxes, containing certain goods and chattels,) to wit, (*here describe the goods, etc.,*) of the said plaintiff, to be taken care of and safely carried by the said defendant from to , and there at , to be safely delivered by the said defendant for (or, to,) the said plaintiff within a reasonable time thence next following, for certain hire and reward to the said defendant in that behalf; and the said defendant did then accept and receive the said , for the purpose and on the terms aforesaid; and although a reasonable time for the carriage and delivery thereof, as aforesaid has long since elapsed, yet the said defendant, not regarding his duty in that behalf, did not, nor would, within such reasonable time as aforesaid, or at any time afterward, take care of, or safely carry the said goods and chattels to aforesaid, nor there at , safely deliver the same for (or, to,) the said plaintiff; but hitherto hath wholly neglected so to do; by means whereof the said of the said plaintiff have been wholly lost to him, the said plaintiff; to his damage $.

Wherefore he prays judgment against the said defendant for the said sum of $, his said damages so as aforesaid sustained.

190. FOR NOT DELIVERING BAGGAGE OF PASSENGER.

The said A B, plaintiff, complains of the said C D, defendant, for that the said defendant, before and at the time of the delivery of the goods and chattels hereinafter described, was the owner of a certain stage-coach, (or, railroad, or, steamboat, *as case may be,*) for the carriage and conveyance of passengers and their baggage for reasonable hire and reward to the said defendant in that behalf; and the said plaintiff, at the special instance and request of the said defendant, did, on the day of , A. D. 18 , cause to be delivered to the said defendant a certain trunk, (or, valise, carpet-sack, box, etc.,) containing the following goods and chattels, to wit, (*here describe them,*) of the said plaintiff to be taken care of and

safely carried by the said defendant to , and there to be safely delivered by the said defendant for the said plaintiff; and the said defendant then and there accepted and received the said and its contents aforesaid, for the purpose aforesaid, and undertook the carriage and delivery thereof as aforesaid; and although a reasonable time for the carriage and delivery thereof as aforesaid has long since elapsed, yet the said defendant, not regarding his said duty in the premises, did not, nor would, within such reasonable time, or at any time since, take care of, or safely carry the said , and its said contents, to aforesaid, nor there safely deliver the same for the said plaintiff, but hath wholly neglected and refused so to do; by means whereof the said plaintiff hath wholly lost said trunk and its said contents; to the damage of the said plaintiff $.

Wherefore he prays judgment against the said defendant for the said sum of $, his damages so as aforesaid sustained.

191. AGAINST A CARRIER BY WATER.

The said A B, plaintiff, complains of the said C D, defendant, for that the said plaintiff, at the special instance and request of the said defendant, did, on the day of , A. D. 18 , at , cause to be delivered to the said defendant divers goods and chattels and merchandise, to wit, (*here describe them,*) of the said plaintiff, of great value, to wit, of the value of $, to be carried by the said defendant in and by a certain ship, (or, steamboat, or, vessel,) called , from aforesaid to , and there, at aforesaid, to be delivered to the said plaintiff (or, *to his assignee,* or, *to the consignee, if one be named,*) for certain freight and reward to the said defendant in that behalf, [the dangers of the seas, (or, river,) the public enemies, and the act of God excepted; (*let this averment correspond with exceptions in bill of lading;*)] and he, the said defendant, then and there took and received the same accordingly, for the purpose aforesaid. And although the said ship (or, vessel, or, steamboat, etc.,) afterward in a reasonable time did safely arrive at aforesaid, and no dangers of the (*let this correspond with the bill of lading;*) prevented the safe carriage or delivery of the said goods, chattels, and merchandise aforesaid, yet the said defendant not regarding his said duty in that behalf, did not deliver the said goods, chattels, and merchandise to the said plaintiff, but so carelessly and negligently conducted himself in this behalf that, for want of due care on the part of said de-

fendant and servants in that behalf, the said goods, chattels, and merchandise became and were wholly lost to the said plaintiff; (or, *if the goods are damaged, state that; if part have been delivered, then no notice need probably be taken of that fact; the petition need specify only the goods lost;*) to the damage of the said plaintiff $.

Wherefore the said plaintiff prays judgment against said defendant for the said sum of $, his damages so as aforesaid sustained.

192. AGAINST AN INNKEEPER, FOR LOSS OF GOODS, ETC.

The said A B, plaintiff, complains of the said C D, defendant, for that the said defendant, before and at the time of the loss hereinafter mentioned, was an innkeeper, and as such kept a common inn for the reception, lodging, and entertainment of travelers, situate at , in the county of , and the said plaintiff heretofore, to wit, on the day of , A. D. 18 , put up, and was then and there received into the said inn as a traveler by the said defendant, and then and there brought into the said inn a certain trunk (or, box, valise, carpet-sack, etc.,) containing certain goods and chattels, to wit, *(here state the articles as specifically as can be done,)* of the said plaintiff, of great value, to wit, of the value of $, and which said trunk, with its contents aforesaid, were then in said inn and so continued up to the loss thereof, as hereinafter mentioned, and that said plaintiff during all that time abided as a traveler therein; yet the said defendant, not regarding his said duty as such innkeeper, did not keep the said trunk and its said contents, so being in said inn, safely and without loss; but on the contrary thereof, the said defendant and his servants so negligently and carelessly conducted themselves in that behalf that afterward, and whilst the said plaintiff so abided in the said inn, to wit, on the day of A. D. 18 , the said trunk and its said contents were, by and through the negligence and default of said defendant and his servants in that behalf, wrongfully taken and carried away by some person or persons, to the said plaintiff as yet unknown, and thus became and are wholly lost to the said plaintiff; to the damage of the said plaintiff $.

Wherefore the said plaintiff prays judgment against the said defendant for the said sum of $, his damages so as aforesaid sustained.

193. AGAINST AN ATTORNEY.

The said A B, plaintiff, complains of C D, defendant, for that, before and at the time of the committing of the wrongs by said defendant hereinafter mentioned, the said plaintiff, at the special instance and request of the said defendant, had retained and employed the defendant as an attorney and counselor at law, to prosecute and conduct and manage a certain action in the Court of Common Pleas, within and for the county of , in said State of Ohio, by and at the suit of the said plaintiff against one E F, for the recovery of a certain sum of money, (or, claim,) to wit, the sum of $, then claimed by the said plaintiff to be due to him from the said E F, for fees and rewards to the said defendant in that behalf; and the said defendant then and there accepted and entered upon said retainer and employment; yet the said defendant, not regarding his said duty in the premises, did not, nor would prosecute, conduct, or manage the said action with due and proper care, skill, and diligence; but on the contrary thereof, prosecuted, conducted, and managed the said action in such a careless, unskillful, undue, and improper manner, and with such want of skill and diligence in that behalf, that the said action afterward, to wit, at the term of said court, A. D. 18 , became and was rendered wholly abortive, and the said plaintiff then and there was forced and obliged to be, and he then and there was nonsuited, (*or if verdict be rendered against him, state the fact as it is,*) whereby the said plaintiff was and has been hindered and prevented from recovering his said claim from the said E F, but is likely to lose the same, and hath also been forced to pay costs and charges, in and about said action expended, to the amount of $, and hath also paid said defendant, as such attorney in said action, the sum of $, whereby the plaintiff hath sustained damages to the sum of $.

Whereupon the said plaintiff prays judgment against the said defendant for the said sum of $, his damages so as aforesaid sustained.

194. AGAINST A SURGEON.

The said A B, plaintiff, complains of the said C D, defendant, for that the said plaintiff, before and at the time of the retainer of the said defendant hereinafter mentioned, had had the bones of his right leg below the knee broken and fractured; and that afterward, to wit, on the day of , A. D. 18 , the said plaintiff, at the special instance and request of the said defendant, retained

and employed the said defendant, as a surgeon, to set and reduce the said fracture of the bones of his said leg to their proper position and place, and to attend to, cure, and heal the same, for a certain fee and reward to the said defendant in that behalf; and the said defendant undertook and entered upon such retainer and employment; yet the said defendant, not regarding his duty in the premises, so carelessly, negligently, and unskillfully set and reduced the said fracture of said leg, and so negligently and unskillfully bound up, and dressed, and bandaged the same, and so unskillfully and negligently nursed and attended to the said fracture and injury, that the said plaintiff, by reason of such unskillfulness and negligence, has wholly lost the use of his said leg, (or, that his said leg has become, and still is, crooked and shorter than in its natural state,) whereby he hath been greatly injured, and rendered unfit and unable to follow his lawful business, and has also been put to great expense, to wit, the sum of $, in and about endeavoring to straighten, and improve, and cure his said leg; to the damage of the said plaintiff $.

Wherefore the said plaintiff prays judgment against the said defendant for the said sum of $, his damages so as aforesaid sustained.

The character of the averments as to the fracture, and the negligence, must be varied to suit the facts of each case. If the neglect was that the fracture was not reduced, whereby the injury occurred, it should be so stated. If the fracture was reduced, and the injury happened from not using a proper splint, or in neglecting to bandage it properly, whereby it got out of place again, it should be so stated, as the fact may be.

195. AGAINST BAILEE.

The said A B, plaintiff, complains of the said C D, defendant, for that the said plaintiff, at the special instance and request of the said defendant, did, on the day of , A. D. 18 , deliver to the said defendant certain goods and chattels, to wit, (*here describe them,*) of the said plaintiff, of great value, to wit, of the value of $, to be by the said defendant, (*here state the purpose for which the goods are received, whether* to be carried or to be kept, or safely to be loaded on a certain steamboat or wagon,) at , for the said plaintiff, for a reasonable reward, (*if no pay is to be given, leave this out,*) to the said defendant in that behalf, and the said defendant then and there received said goods and chattels for the

purpose aforesaid; yet the said defendant, not regarding his duty in that behalf, afterward, on the day of , A. D. 18 , by himself and his servants in that behalf, conducted himself so carelessly and negligently in and about the loading of the said goods on board of said ship, that, by and through the mere negligence of the said defendant and his servants in that behalf, the said goods and chattels then and there became and were greatly broken and damaged, and wholly lost to the said plaintiff; to the damage of said plaintiff $.

Wherefore the said plaintiff prays judgment against the said defendant for the said sum of $, his damages so as aforesaid sustained.

196. FOR NOT TAKING CARE OF GOODS, WITHOUT REWARD.

The said A B, plaintiff, complains of the said C D, defendant, for that the said plaintiff, at the special instance and request of the said defendant, did, on the day of , A. D. 18 , deliver to the said defendant the following goods and chattels, to wit, (*here describe the same,*) of the said plaintiff, of the value of $, to be taken care of and safely kept by the said defendant for the said plaintiff, and to be redelivered by the said defendant to the said plaintiff, when he, the said defendant, should be thereunto afterward requested; and the said defendant then and there had and received said goods and chattels for the purpose aforesaid; and the said plaintiff further saith that afterward, to wit, on the day of , A. D. 18 , he requested the said defendant to redeliver to him, the said plaintiff, the said goods and chattels; yet the said defendant did not, nor would take due care of said goods and chattels, or safely keep the same for the said plaintiff, nor did, nor would, when so requested as aforesaid, or at any time before or since, redeliver the same to the said plaintiff; but, on the contrary, the said defendant so carelessly conducted himself with respect to the said goods and chattels, that, by and through the negligence and default of the said defendant, the said goods and chattels became and were wholly lost to the said plaintiff; to the damage of the said plaintiff $.

Wherefore the said plaintiff prays judgment against the said defendant for the said sum of $, his damages so as aforesaid sustained.

197. FOR DECEIT IN SALE OF A HORSE.

The said A B, plaintiff, complains of the said C D, defendant, for that the said plaintiff, at the special instance and request of the said defendant, did, on the day of , A. D. 18 , bargain with the said defendant to buy of him, the said defendant, a certain horse, (or, mare,) at and for a certain price or sum of money, to wit, the sum of $, and the said defendant, to induce said plaintiff to buy said horse at the sum aforesaid, did then falsely represent that the said horse, so far as he, the said defendant, knew, was sound and gentle, and broken to draw in a carriage; and the said plaintiff, relying on the statements of the said defendant, did then buy of the said defendant the said horse, at the said sum of $, and then paid the said defendant therefor; and the said plaintiff saith that the said horse was not sound, nor gentle, nor broken to draw in a carriage, as the said defendant represented; but that said horse was unsound in this—that he had a certain disease, called , and was also lame in his right foreshoulder, and had been greatly injured in his health by having been overworked, so that he could not perform the labor of a well and sound horse, and that said horse was restive, fractious, liable to kick, and refused to draw in a carriage; and the said plaintiff further saith that the said defendant, at the time he so represented said horse to be sound and gentle, and broken to a carriage, well knew that said horse was not sound, gentle, and broken to a carriage; but, on the contrary, knew that said horse was unsound, restive, fractious, liable to kick, and would not draw in a carriage; wherefore the said plaintiff saith he has been deceived by the said defendant; to the damage of him, the said plaintiff, $.

Wherefore the said plaintiff prays judgment against said defendant for the said sum of $, his damages so as aforesaid sustained.

198. FOR DECEIT ON EXCHANGE OF A HORSE.

The said A B, plaintiff, complains of the said C D, defendant, for that the said plaintiff heretofore, to wit, on the day of , A. D. 18 , at the special instance and request of the said defendant, bargained with the said defendant to exchange with the said defendant a certain horse, (or, filly; or, mare; or, colt; or, ox, cow, etc.,) of the said plaintiff, of the value of $, and for a sum $, in money, to be therefor paid and delivered by the said plaintiff to the said defendant, together with the said horse of the said plaintiff in exchange for the said horse of the said defendant;

and the said defendant, to induce said plaintiff to make said exchange, then falsely, knowingly, and willfully represented to the said plaintiff that the said horse of the said defendant was sound, as far as he, the said defendant, knew, (or, gentle; or, broken to work in a carriage or team; *or whatever the representation was,*) he, the said defendant, then well knowing that said horse was not sound; and the said plaintiff, confiding in said representation, did then deliver his said horse, and paid said sum of money to the said defendant in exchange for the said horse of the said defendant; and the said plaintiff saith that at the time of said exchange the said horse was not sound, but, on the contrary, was then, and still is, unsound, and hath become of no value to the said plaintiff; to the damage of the said plaintiff $.

Wherefore the said plaintiff prays judgment against the said defendant for the said sum of $, his damages so as aforesaid sustained.

199. FOR DECEITFULLY SELLING A SMALLER QUANTITY OF COAL THAN PRETENDED.

The said A B, plaintiff, complains of the said, C D, defendant, for that the said plaintiff, on the day of , A. D. 18 , at the special instance and request of the said defendant, bargained for and agreed to buy of the said defendant, and the said defendant then sold to the said plaintiff, bushels of coal, at and for the price of for each and every bushel; and the said defendant afterward, on the said day of , A. D. 18 , fraudulently and deceitfully intending to defraud the said plaintiff, did fraudulently and deceitfully deliver to the said plaintiff only bushels of coal, as and for the said quantity of bushels, so bargained for and sold to the said plaintiff as aforesaid, he, the said defendant, then well knowing that the coal so delivered did not contain the said quantity of bushels, but only the said quantity of bushels; to the damage of the said plaintiff $.

Wherefore the said plaintiff prays judgment against the said defendant for the said sum of $, his damages so as aforesaid sustained.

NOTE.—See 3 Starkie, 23.

200. FOR DECEITFULLY SELLING A TRACT OF LAND FOR MORE THAN WAS IN IT.

The said A B, plaintiff, complains of the said C D, defendant, for that the said plaintiff, on the day of , A. D. 18 , bar-

gained with the said defendant to buy of him a certain piece or parcel of land of the said defendant, situate , which said piece or parcel of land the said defendant then falsely represented to contain acres, when he, the said defendant, then well knew that said piece or parcel of land contained only acres therein; that the said plaintiff, then confiding in the truth of said representations, and supposing said parcel of land to contain the said quantity of acres, agreed to pay for said land, and did then pay therefor to the said defendant the sum of $, whereas in truth and fact the said piece or parcel of land did not contain the said quantity of acres, but only the quantity of acres, whereby the said plaintiff has sustained damages to the amount of $.

Wherefore the said plaintiff prays judgment against the said defendant for the said sum of $, his damages so as aforesaid sustained.

NOTE.—Wardell *v.* Davis, 13 Johns. 325; Morrell *v.* Colver, 13 Ib. 395.

201. FOR FALSELY REPRESENTING A THIRD PERSON AS FIT TO BE TRUSTED.

The said A B, plaintiff, complains of the said C D, defendant, for that the said plaintiff, before and at the time of the committing of the injuries hereinafter stated, was, and ever since hath been, a , and has carried on at , the said trade and business during all that time; and one E F did then and there apply to the said plaintiff, and requested said plaintiff to sell goods on a credit to the said E F, in the way of the said plaintiff's said trade and business of a ; and the said plaintiff, being then unacquainted with the character and solvency of the said E F, was, by the said E F, then referred to the said defendant for information respecting the character and solvency of him, the said E F; and the said plaintiff did, on the day of , A. D. 18 , apply to the said defendant for information as to the character and solvency of the said E F, and the said defendant did then, in reply to such application, falsely represent and assert to the said plaintiff that the said E F was of a fair character for integrity as a business man, that he was a merchant at , and was worth the sum of $, and could safely be trusted for any sum not exceeding $, (*or whatever the representation,*) and that the said plaintiff, relying upon said representations, did then sell a bill of goods to the said E F on a credit of months, to the amount of $, which said bill of goods the

said E F has never paid; and the said plaintiff avers that the said E F, at the time of the said representations, was not a man of integrity, and was not worth the said sum of $, and could not then be safely trusted for any sum not exceeding $; but on the contrary, that the said E F was notoriously a dishonest man, was wholly insolvent, and unfit to be trusted for any sum whatever; and the said defendant, when he so made the said representations, well knew that the said E F was not a man of integrity, that he was wholly insolvent, and unfit to be credited for any amount whatever; whereby the said plaintiff has sustained damages to the amount of $.

Wherefore the said plaintiff prays judgment against the said defendant for the said sum of $, his damages so as aforesaid sustained.

For the law on this subject, see McCracken *v.* West et al., 17 Ohio, 16; 2 East, 107; 3 B. & P. 367; 1 Taunt. 558; 6 Bing. 396; 3 Esp. 194; 7 Price, 544; Young *v.* Covell, 8 Johns. 23; Addington *v.* Allen, 11 Wend. 375.

202. FOR NEGLIGENCE IN DRIVING A CARRIAGE.

The said A B, plaintiff, complains of the said C D, defendant, for that the said plaintiff, on the day of , A. D. 18 , was possessed of a certain wagon (or, coach, or, buggy,) of the value of $, and of a horse, of the value of $, then drawing said wagon, and in which said wagon, so being drawn, the said plaintiff was then riding along a certain public highway; and the said defendant was also then and there possessed of another wagon and another horse (or, two, or, four other horses,) drawing the same, and which wagon and horses were then under the direction of the said defendant (or, of a certain servant of the said defendant,) who was then and there driving the same in and along said highway; and that the said defendant then and there (or, by his said servant,) so carelessly drove his said wagon and horse that, by and through the carelessness and negligence of the said defendant, (or, by his said servant,) in that behalf, the said wagon of the said defendant then and there ran and struck with great force upon and against the wagon of the said plaintiff, and thereby crushed, broke in pieces, and greatly damaged the same; and thereby the said plaintiff was thrown with great force from his said wagon to and upon the ground, and was thereby greatly hurt, bruised, and wounded, (or, if any bones were dislocated, or frac-

tured, set that fact forth,) and became sick and lame, and so remained for weeks, and was, during all that time unable to attend to his usual business, and was forced to expend $, in and about endeavoring to be cured of his said hurt and wounds, and in and about repairing his said wagon so as aforesaid injured; to the damage of the said plaintiff $.

Wherefore the said plaintiff prays judgment against the said defendant for the said sum of $, his damages so as aforesaid sustained.

For the law, see 3 C. & P. 544; 1 East, 106; 3 Ib. 593; 6 Term, 125; 5 Ib. 648; 4 B. & A. 590; 2 Esp. 685; Jaquith *v.* Richardson, 8 Metcalf, 213; Dudley *v.* Bolles, 24 Wend. 465; Johnson *v.* Small, 5 B. Mon. 25; Fales *v.* Dearborn, 1 Pick. 345; Palmer *v.* Barker, 2 Fairf. 338.

203. NEGLIGENCE IN NAVIGATING STEAMBOATS, SHIPS, ETC.

The said A B, plaintiff, complains of the said C D, defendant, for that the said plaintiff, before and at the time of committing the injuries hereinafter mentioned, was possessed of a certain flat-boat, (barge, steamboat, or other water-craft, *as the case may be*,) of the value of $, then afloat in the Ohio river, and loaded with divers goods and chattels, to wit, (*here describe them*,) and the said defendant was then and there possessed of a certain steamboat, called the , (or, other vessel,) and then and there, (by and through his servants,) had the management and direction thereof; and the said defendant, not regarding his duty in that behalf, and whilst the said flat-boat was floating upon said river, took so little and such bad care of his said steamboat, in the direction and management thereof, that the same, by and through the carelessness, negligence, and mismanagement of the said defendant (or, *if he was not on board*, by his servants in that behalf,) then and there with great force ran foul of and struck against the said flat-boat of the said plaintiff, and thereby broke and greatly damaged the same, and thereby the said goods and chattels of the said plaintiff then on board of said flat-boat became and were greatly wetted, damaged, and spoiled; and the said plaintiff, by reason thereof, has been obliged to lay out, expend, and pay the sum of $, in and about repairing the damage to said flatboat, and in saving and taking care of said goods and chattels so as aforesaid injured; and was also deprived of the use of his said

flatboat for the space of ; to the damage of the said plaintiff $.

Wherefore the said plaintiff prays judgment against the said defendant for the said sum of $, his damages so as aforesaid sustained.

The plaintiff can not recover if the fault by which the accident occurred was his; the plaintiff must show he used ordinary care. Barnes *v.* Cole, 21 Wend. 188; 4 McLean, 286, 589; Rathburn *v.* Payne, 19 Ib. 399: United States *v.* Mayor, 5 Mo. 230; Simpson *v.* Hand, 6 Whart. 311; Logan *v.* Steamboat Clipper, 18 Ohio, 375. Nor is the owner of the steamboat or vessel liable for an injury willfully committed by the master or pilot running her. Turnpike Co. *v.* Vanderbilt, 1 Hill, 480.

So, where the collision occurs without the negligence of either party, each must bear his own loss. Stainbach *v.* Roe, 14 How. U. S. 532; Williamson *v.* Barrett, 13 Ib. 101; Halderman *v.* Beckwith, 4 McLean, 286; Barrett *v.* Williamson, 4 Ib. 589; 4 Harring. 228; 1 Texas, 30.

Steam-vessels are bound to keep clear of floating or sailing vessels, treated as having wind in their favor. St. John *v.* Paine, 10 How. U. S. 581; Nanton *v.* Stebbens, 10 Ib. 586; The Lady Anne, 1 Eng. L. & Eq. 670; The Europa, 2 Ib. 557; Western Belle *v.* Wagner, 11 Mo. 30.

204. AGAINST ADJOINING LOT-OWNER FOR FLOWING WATER FROM RESERVOIR INTO HIS MINE.

The said plaintiff complains of said defendant, for that at the time of committing the grievances hereinafter mentioned, the said defendant was possessed of certain lands, situate in , of the county of , except the mines and veins of coal under the same; and that the plaintiff was possessed of certain coal mines lying near the land of said defendant, situate in the aforesaid, and that by reason thereof and by a license of A B, in possession of certain underground openings and cavities near said mines, he was entitled to use those cavities for the purpose of working the said mines and veins of coal, and getting coals from said mines and carrying them through said openings and cavities; yet the said defendant so carelessly and negligently constructed on the said land of said defendants a reservoir to contain water, and kept therein in their possession and under their care large quantities of water, and took so little and such bad care of the water in said

reservoir and of said reservoir, that, on the day of , A. D. 18 , large quantities of said water, by reason of the premises, escaped from said reservoir, and flowed toward and into said mines and cavities and openings, whereby the said plaintiff was prevented for a long time from working the mines and getting coal therefrom and carrying the same through the said cavities and openings, and was put to great expense in pumping out the water aforesaid and repairing the damage done by it, and lost great gains and profits, which he otherwise might have made thereby, and that such reasonable fear of being drowned in the mines and cavities was caused in the minds of the workmen therein then and theretobefore employed, that the working of said mines became impossible for a time and was permanently rendered more expensive and difficult than it had been theretofore, or would otherwise have continued to be; to the damage of the plaintiff $.

Wherefore the plaintiff demands judgment against said defendant for said sum of $, his damages so as aforesaid sustained.

A B, Attorney for Plaintiff.

This is substantially a copy of the declaration in the case of Fletcher *v.* Rylands, L. R., 1 Exch. 265. With a little change it may be made to meet numerous cases that may in practice arise. The parties in this case were not the owners in fee of the land, but tenants of Lord Wilton. The language would be a little changed where the parties owned the fee; the averment then might be that the plaintiff or defendant *was seized in fee and possessed of certain real estate.* It is the one who occupies the land and erects the cause of the damage who is liable, whether he be owner or tenant. The opinion of Blackburn, J., who delivered the opinion of the Court of Exchequer, is a most exhaustive examination of the law under which parties are liable for damages happening to another from their acts.

205. NEGLIGENCE IN HAVING POISONOUS TREES ON ONE'S LAND AND ALLOWING THEM TO GET ON LAND OF ANOTHER.

The said A B, plaintiff, complains of the said C D, defendant, for that the said defendant heretofore, to wit, on the day of , A. D. 18 , and before and after that time, and at the time of committing the grievances hereinafter stated, was in the possession of a certain parcel of land, containing acres, more or less, situate in the of , in the said county of , and had growing thereon certain trees, the clippings of which trees were poisonous

to horses and cattle eating the same, to wit, (*here name the kind of trees;*) and that the said plaintiff was possessed of a certain other field or parcel of land adjoining to the said field or parcel of land of said defendant, and in which the said plaintiff kept and pastured his horses and cattle, to wit, horses and cattle, of all which aforesaid the said defendant had full knowledge; yet the said defendant, disregarding his duty in that behalf, clipped or caused to be clipped the branches and twigs from off said trees, and so carelessly took care of and managed said branches and twigs so cut from off said trees, that the same, through the carelessness and negligence of said defendant, were thrown and got into the field of said plaintiff, and the horses and cattle of said plaintiff eat thereof, and thereby became poisoned and died, to wit, horses and cattle of great value, to wit, of the value of $, died, and the other horses and cattle were, by the eating of said poisonous branches and twigs greatly injured; to the damage of plaintiff $.

This form is drafted from the case of Wilson *v.* Newberry, L. R., 7 Q. B. 31; S. C., 1 Eng. 14. The declaration in that case was defective. The liability of the party on the facts here set up is admitted. Fletcher *v.* Rylands, L. R., 3 H. L. 330; Tennont *v.* Goldwin, 1 Salk. 360. When the owner of land, without willfulness or negligence, uses his own land in the ordinary manner of its use, though mischief should thereby be occasioned to his neighbor, he will not be liable in damages; but if he brings upon his land anything which would not naturally come upon it, and which is in itself dangerous, and may become mischievous if not kept under proper control, though in so doing he may act without personal willfulness or negligence, he will be liable in damages for any mischief thereby occasioned. Rylands *v.* Fletcher, L. R., 3 H. L. 330. In this case the plaintiff owned a coal mine which he was working in the usual way; the defendant had a mill on land near that of plaintiff's, and built thereon a reservoir for storing water for his mill; but under the reservoir there were several old vertical shafts connecting with horizontal workings of an abandoned coal mine; the plaintiff in his mining came in contact with horizontal workings; the vertical shafts, which had apparently been filled up, gave way, and the water from the reservoir passed down them and along the horizontal workings into and flooded the mine and workings of the plaintiff, to his damage. Blackburn, J., in the court below, as cited by Lord Cairns, Lord Ch., uses the following lan-

guage adopted by Lord Cairns, L. Ch.: "We think that the true rule of law is that if a person who, for his own purposes, brings on his land, and collects and keeps there anything likely to do mischief if it escapes, he must keep it in at his peril; and if he does not do so, is *prima facie* answerable for all damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default, or perhaps that the escape was the consequence of *vis major*, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person, whose grass or corn is beaten down by the escaping cattle of his neighbor, or whose mine is flooded by the water from his neighbor's reservoir, or whose cellar is invaded by the filth of his neighbor's privy, or whose habitation is made unhealthy by the fumes and noisome vapors of his neighbor's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbor, who has brought something on his own property (which is not naturally there), harmless to others so long as it is confined to his own property, but which he knows will be mischievous if it gets on his neighbor's, should be obliged to make good the damage which ensues, if he does not succeed in confining it to his own property. But for his act in bringing it there, no mischief could have accrued, and it seems but just that he should at his peril keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequences. And upon authority, this, we think, is established to be the law, whether the things so brought be beasts, or water, or filth, or stenches." Smith *v.* Kenrick, 7 C. B. 564; Baine *v.* Williamson, 15 C. B., N. S. 376.

On questions of mining, and the rights and liabilities of the owners of adjoining mines, *vide* Williams *v.* Groucott, 4 B. & S. 149; Imperial Gas Co. *v.* Broadbent, 7 H. L. Cases, 600; Bamford *v.* Tumley, 3 B. & S. 62; Tipping *v.* St. Helen's Smelting Co., 4 B. & S. 609; 11 H. L. Cases, 642.

Lord Cranworth said, in the above case of Rylands *v.* Fletcher: "In considering whether a defendant is liable to a plaintiff for damage which the plaintiff may have sustained, the question in general is not whether the defendant has acted with due care and caution, but whether his acts have occasioned the damage. This is all well explained in the old case of Lambert *v.* Bessey, reported by Sir Thomas Raymond. Sir T. Raym. 421. And the doctrine is founded on good sense. For when one person, in managing his

own affairs, causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer. He is bound *uti suo ut non lædat alienum.* This is the principle of law applicable to cases like the present, and I do not discover in the authorities which were cited anything conflicting with it."

In this case it was claimed for the defendant that he was ignorant of the shafts and horizontal working when the reservoir was placed there, and the giving away of the filling in them caused the flow of water and the injury complained of. But the court held that this ignorance made no difference in his liability.

206. LEAVING A HOLE NEAR HIGHWAY.

The said A B, plaintiff, complains of the said C D, defendant, for that, heretofore, to wit, on the day of , A. D. 18 , the said defendant was the occupier and possessor of a certain warehouse and a hoist-hole, vault, or cellar, situate in street, in the of , in said county, and adjoining to and within feet of a public highway, to wit, (*here state the street or highway,*) and wrongfully suffered the said hoist-hole, vault, or cellar to be and remain open to said highway, to wit, to said aforesaid, without any light, railing, fence, or protection whatever, so as to be dangerous to persons passing along said during the hours of darkness, and that the said plaintiff, while lawfully passing along said during the hours of darkness, and without any fault on his part, fell into the said hoist-hole, vault, or cellar, and was greatly injured in his person, in this, to wit, (*here state the injury received.*) and was compelled to employ surgeons to dress and attend to said injuries so received, at a great expense, to wit, at the expense of $, and was thereby rendered unable to attend to his daily calling, but, on the contrary, was confined to his bed and house for the space of days, and has been thereby disabled, for a long time thereafter being unable to attend as usual to his daily calling and business; to his damage $.

Wherefore the plaintiff demands judgment against said defendant for said sum of $, his damages so as aforesaid sustained.

J H N, Attorney for Plaintiff.

This form is taken from the declaration in the case of Hadley *v.* Taylor et al., L. R., 1 C. B. 53. Erle, C. J.: "The plaintiff seeks compensation for an injury sustained through falling into a hole on defendants' premises. The hole was not upon the public highway, but distant from it about fourteen feet. I think, however,

the defendants would be liable for a nuisance to the highway, if the excavation was so near to it that a person lawfully using the way, and using ordinary caution, accidentally slipping, might fall into it. So the law is laid down in Barnes *v.* Ward, 9 C. B. 392, and in numerous other cases. . . . Generally speaking, the party responsible for a nuisance is the person in the occupation of the premises in which the nuisance complained of exists. It may be that others may be liable also; but the occupier, who probably knows most about it, is bound to see that no dangerous nuisance exists on the premises." Robins *v.* Jones, 15 C. B., N. S. 221; Banks *v.* The South Yorkshire R. & River Co., 3 B. & S. 244.

207. AGAINST SHIP-OWNERS FOR NEGLIGENCE IN A COLLISION.

The said A B, plaintiff, complains of said C D, E F, and G H, defendants, for that the said defendants were the owners of a steam-vessel called the , lying at anchor at the port of , and bound on a voyage from that port to the port of , in the of , and thereupon the plaintiff delivered to the said defendants, and said defendants received certain goods of the plaintiff, to wit, (*here state the articles shipped, and the value of same,*) to be by them shipped on board the said steam-vessel, and safely and securely carried therein from the said port of to the said port of , and there to be delivered unto the order of said plaintiff, (or, *to the person to whom assigned, as shown in bill of lading,*) or his assigns, the act of God, public enemies, pirates, robbers, thieves, barratry of master or mariners, restraint of rulers, fire, accident, or damage from machinery, boilers, steam, or from other goods by contact, sweating, leaking, or otherwise, or accidents, or damage of the seas, rivers, and steam navigation of whatever nature or kind soever, excepted, he or they paying freight for the said goods in cash, on ship's arrival, free of interest, at the rate of per ton of twenty hundred-weight, gross weight, with fifteen per cent. primage and average accustomed; and that the said defendants were not prevented from so carrying or delivering the said goods by any of the perils or casualties aforesaid; yet the said defendants did not safely or securely carry or deliver the said goods, but took such bad and improper care of their said steam-vessel, and navigated, and directed, and managed the same in so careless, negligent, and improper a manner, that, by and through the carelessness, negligence, mismanagement, and improper conduct of the said defendants, by their servants and mariners in that behalf, the said steam-vessel with great force and violence ran foul of and struck against a cer-

tain other steam-vessel, to wit, the Aaxes, whereby the steam-vessel of the said defendants, and the plaintiff's said goods on board the said steam-vessel, were sunk, and the goods of the plaintiff became wholly lost to the plaintiff; to his damage $.

Wherefore said plaintiff demands judgment against said defendants for said sum of $, his damages, so as aforesaid sustained.

F W, Attorney for Plaintiff.

This petition is taken from the report of the case of Gill *v.* General Iron Screw Collier Co., L. R., 1 C. P. 600. The conditions of the shipment must be according to the bill of lading. This form will answer with very slight changes for cases where goods have been lost by collisions on the Ohio and Mississippi rivers and tributaries. The case is very ably argued by counsel and fully considered by the court. The carrying vessel is liable for the loss, if the collision occurs from her fault. Willes, J.: "No information, however, has been given as to the meaning to be attached to *gross negligence*, in this case; and I quite agree with the dictum of Lord Cranworth in Wilson *v.* Britt, 11 M. & W. 113, that gross negligence is ordinary negligence with a vituperative epithet; a view held by the Exchequer Chamber. Beal *v.* South Devon R. R. Co., 3 H. & C. 337. Confusion has arisen from regarding negligence as a positive, instead of a negative word. It is really the absence of such care as it was the duty of the defendants to use. A bailee is only bound to use the ordinary care of a man, and so the absence of it is called 'gross negligence.' A person who undertakes to do some work for reward to an article, must exercise the care of a skilled workman, and the absence of such care in him is negligence. 'Gross,' therefore, is a word of description, and not a definition, and it would have been only introducing a source of confusion to use the expression 'gross negligence,' instead of the equivalent, 'a want of due care and skill in navigating the vessel,' which was again and again used by the lord chief justice in his summing up." Smith, J., in same case says: "The use of the term *gross negligence* is only one way of stating that less care is required in some cases than in others, as in the case of gratuitous bailees; and it is more correct and scientific to define the degrees of care than the degrees of negligence." *Vide* also Lloyd *v.* General Iron Screw Collier Co., 3 H. & C. 284; Davis *v.* Garrett, 6 Bing. 716; Phillips *v.* Clark, 2 C. B., N. S. 156; Dixon *v.* Sadler, 5 M. & W. 405; Smith *v.* Scott, 4 Taunt. 126; The Aaxes, 15 Moore P. C. 122; Tuff *v.* Warman, 2 C. B., N.

S. 740; 5 C. B., N. S. 573; Todd *v.* Ritchie, 1 Stark. 240; Phyn *v.* Royal Exch. As. Co., 7 Term, 505; Wyld *v.* Pickford, 8 M. & W. 443; Worms *v.* Storey, 11 Exch. 427; Scordet, 4 Bing. 607; Daken *v.* Oxley, 15 C. B., N. S. 646; Jones *v.* Pitcher, 3 Stewart & Porter, 135; Lyons *v.* Mills, 5 East, 428; Wilson *v.* Rankin, 6 B. & S. 208; L. R., 1 Q. B. 162.

208. AGAINST OWNER OF STORE FOR LEAVING UNFENCED A HOLE IN FLOOR OF STORE.

The said A B, plaintiff, complains of the said C D, defendant, for that before and at the time of the happening of the grievances and injuries hereinafter stated, the said C D was possessed of a certain high building, situate on street, in the city of , in the county of , containing several floors, used by defendant as a sugar refinery (or, warehouse, store-house, *as the case may be*,) in the interior of which was a shaft or shoot passing from the basement of said building upward through the several floors thereof, and which said shaft or shoot was highly dangerous to persons entering the said building, who might be unacquainted with the same, as the said defendant then well knew; and that the plaintiff, then being unacquainted with the said premises, was, on the day of , A. D. 18 , employed by said defendant to enter the said building and execute certain work therein in his trade of a gas-fitter (or, joiner, or other trade,) after darkness had set in, in the evening of said day, for said defendant, upon one of the upper floors of said building; yet the said defendant, wholly disregarding his duty in the premises, wrongfully, negligently, and improperly allowed said shaft or shoot to remain and be open, unfenced, unguarded, and unlighted, while the plaintiff was so lawfully engaged there in his said business, and that said plaintiff, by reason thereof and without any fault on his part, and whilst lawfully there in his said business, fell down through said shaft or shoot, and was precipitated through the same to the basement of said building and was thereby greatly hurt and injured in this, to wit: (*here state injuries*,) and by reason of said injuries said plaintiff was disabled from work for the space of days, and compelled to pay large sums of money for the services of a surgeon, nurses, and other assistance in nursing, watching with, and taking care of him while so laid up, to wit, to the amount of $, and other injuries sustained; to the damage of the plaintiff $.

Wherefore plaintiff demands judgment against said defendant for said sum of $, his damages so as aforesaid sustained.

S N, Attorney for Plaintiff.

This petition is copied from the declaration in the case of Indemaur *v.* Dames L. R., 1 C. B. 274. The court held that inasmuch as the plaintiff was upon the premises on lawful business, and the hole or shoot was from its nature unreasonably dangerous to persons not usually employed there, but having a right to go there, the defendant was guilty of a breach of duty toward him in suffering the hole to be unfenced. Willes, J.: "The common case is that of a customer in a shop; but it is obvious that this is only one of a class; for, whether the customer is actually chaffering at the time, or actually buys or not, he is, according to an undoubted course of authority and practice, entitled to the exercise of reasonable care by the occupier to prevent damage from unusual dangers of which the occupier knows, or ought to know, such as a trap-door left open, unfenced, and unlighted. Lancaster Canal Co *v.* Parnaby, 11 Ad. & E. 223; Chapman *v.* Rothwell, E. B. & E. 168. This protection does not depend upon the fact of a contract being entered into in the way of the shopkeeper's business during the stay of the customer, but upon the fact that the customer has come into the shop in pursuance of a tacit invitation given by the shopkeeper with a view to business which concerns himself. . . We think this argument fails, because the capacity in which the plaintiff was there, was that of a person on lawful business in the course of fulfilling a contract in which both the plaintiff and the defendant had an interest, and not upon bare permission. . . The class to which the customer belongs includes persons who go not as mere volunteers, or licensees, or guests, or servants, or persons whose employment is such that danger may be considered as bargained for, but who go upon business which concerns the occupier, and upon his invitation, express or implied. And with respect to such a visitor at least, we consider it settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows, or ought to know; and that where there is evidence of neglect, the question whether such reasonable care has been taken by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as a matter of fact." *Vide* Wilkinson *v.* Fairrie, 1 H. & C. 633; 7 H. & N. 937; Balch *v.* Smith, 7 H. & N. 736. "The distinction is," says Erle, C. J., in Chapman *v.* Rothwell, E. B. & E. 168, "between the case of a visitor (as was the case in Southcote *v.* Stanley, 1 H. & N. 247,) who must take care of himself, and customer, who, as one of the public, is invited for the purposes

of business carried on by the defendant." McCarthy *v.* Younge, 6 H. & N. 329; Seymour *v.* Maddox, 16 Q. B. 326; Hannsel *v.* Smyth, 7 C. B., N. S. 731; Clarke *v.* Holmes, 7 H. & N. 937; Toamey *v.* L. & Bri. R. R. Co., 3 C. B., N. S. 146; Sullivan *v.* Waters, 14 Irish C. L. 460; Corly *v.* Hill, 4 C. B., N. S. 556; Barnes *v.* Ward, 9 C. B. 392.

209. FOR CARELESSLY MINING SO AS TO INJURE THE OWNER OF THE SURFACE, BY REVERSIONER.

The said A B, plaintiff, complains of the said C D, defendant, for that at and before the committing of the grievances hereinafter mentioned, certain houses were in possession of divers persons as tenants thereof to the plaintiff, the reversion therein respectively then and still belonging to the plaintiff, which houses had been erected and standing for a long space of time, to wit, for the space of twenty-one years before and at the time of the committing the grievances hereinafter mentioned; and the plaintiff before and at the time of committing the grievances hereinafter mentioned, was rightfully entitled to have said houses in which he was so interested as aforesaid, and the foundations thereof, supported by the soil and land contiguous and near to the same, and also to have the foundations of the said houses, and the land whereupon the same were erected and standing, sufficiently supported by the minerals lying under the said last-mentioned land; yet the defendant, well knowing the premises, wrongfully and negligently worked certain mines under the land on which said houses were erected, and under land contiguous and near thereto, and removed the coals and minerals from the said several mines without leaving any sufficient support to the said houses, so that, by reason thereof, the foundation of the said houses, in which the plaintiff was so interested as aforesaid, became and were weakened, damaged, and undermined, and became incapable of supporting the said houses; and the said houses cracked, sank in, and became and were dilapidated and unsafe; and by means of the premises, divers of the said houses became and were unfit for habitation for considerable periods of time, and became and were of much less value to the plaintiff than they otherwise would have been; and by reason thereof and thereby the plaintiff has been injured and prejudiced in his reversionary estate and interest; to his damage $.

Wherefore he prays judgment against said defendant for said sum of $, his damages so sustained.

T J, Attorney for Plaintiff.

The above form is substantially copied from that in the case of Rowbotham *v.* Wilson, 92 Eng. C. L. 122; S. C., 8 Ellis & Bl. 123. The plaintiff did not recover on account of some covenants between the owner of the surface and the owner of the minerals. Watson, B., says: "It is established by authorities (Wilkinson *v.* Proud, 11 M. & W. 33), that the coal mines, when conveyed, become a separate tenement. The land above and the coal beneath become separate tenements, with all the incidents of separate ownership. The same rules of law apply in such case as to the right of lateral support of adjoining lands, which is not an easement. If, by digging, the adjoining land is let down, the right to compensation is on the ground that the adjoining owner could not use his own land to the prejudice of his neighbor, not on the ground of the disturbance of an easement. 2 Rol. Abr. 564. The course of precedents shows this; for it is not necessary to allege, in such case, that the plaintiff had the right to support. Earl of Lonsdale *v.* Littledale, 2 H. Bl. 267, and the declaration and judgment in Humphries *v.* Bragden, 12 Q. B. 739; S. C., 64 Eng. C. L. 739; with this distinction that the right to support to a building upon the land is acquired by twenty years existence, whereas the land is entitled to support in its original state. In Harris *v.* Ryding, 5 M. & W. 60, it was held that, where A being seized in fee of certain real estate, granted the land to P, his heirs and assigns, reserving to himself, his heirs and assigns, "all and all manner of coals; seams and veins of coal, iron ore, and all other mines and minerals and metals, which then were, or at any time and from time to time thereafter, should be discovered in and upon said premises, to dig, delve, search for, and get, etc., the said mines and every part thereof, and to sell and dispose of, take and convey away the same at their free will and pleasure; and also to sink shafts, etc., for the raising up works, carrying away, and disposing of the same or any part thereof, making a fair compensation to P, for the damage to be done to the surface of the premises, and the pasture and crops growing thereon," under this reservation A was not entitled to take all the mines, but only so much as he could get, leaving a *reasonable* support to the surface. Parke, B.: "It is clearly the meaning and intention of the grantor that the surface shall be fully and beneficially held and enjoyed by the grantee, he reserving to himself all the mines and veins of coal and iron ore below. By reasonable intendment, therefore, the grantor can be entitled under the reservation only to so much of the mine below as is consistent

with the enjoyment of the surface, according to the true intent of the parties to the deed; that is, he only reserves to himself so much of the mines and minerals as could be got, leaving a reasonable support to the surface. . . . It became necessary to inquire whether or not he was bound to leave support for an additional superincumbent weight upon the surface; probably he would not be." As to the compensation clause, the court held that had reference solely to the use of the surface, and had no reference to the underground mining. Humphries *v.* Bragden, 12 Q. B. 739; S. C., 64 Eng. C. L. 739; Smart *v.* Morton, 5 E. & Bl. 30; S. C., 85 Eng. C. L. 30; Caledonia R. W. Co. *v.* Sprot, 2 Macq. H. L. Cas. 449. In Smart *v.* Norton, *supra*, Lord Campbell, Ch. J., says: "*Prima facie*, the owner of the surface is entitled to support from the subjacent strata; and if the owner of the minerals work them, it is his duty to leave sufficient support for the surface in its natural state. But the *prima facie* rights and obligations of the owner of the surface and of the minerals may be varied by the production of title deeds or by other evidence." Jeffries *v.* William, 5 Exch. 792; Helton *v.* Earl of Granville, 5 Q. B. 701; S. C., 48 Eng. C. L. 701.

The conveyance of land with buildings on it, with reservations of coal and minerals like the above, would seem to require a sufficient support for soil and buildings. This is not the case, it seems, when land is conveyed with no buildings, unless buildings have been erected for twenty years.

210. FOR SELLING DEFECTIVE GUN, BY WHICH PLAINTIFF INJURED.

The said A B, plaintiff, complains of the said C D, defendant, for that one E F, the father of said plaintiff, on the day of , A. D. 18 , at the request of said defendant, bargained with said defendant to buy of him a certain gun for the use of himself and *his sons*, at and for a certain price, to wit, for the sum of $, and that the said defendant then by falsely and fraudulently warranting the said gun to have been made by one , and to be a good, safe, and secure gun, then sold the same to the said E F, for the use of himself and *his sons*, for the said sum of $. then paid by said E F to the said defendant for said gun; and the said plaintiff avers that, in truth and in fact, the said defendant was guilty of a great breach of duty, and of willful deceit, negligence, and improper conduct, in this, that the said gun, at the time of said warranty and sale, was not made by said , nor was it a good, safe, and secure gun, but on the contrary thereof, was made by a maker very inferior as a gunmaker to said and was

then and at all times a very bad, unsafe, ill-manufactured, and dangerous gun, and wholly unsound and of very inferior materials; of all which premises the said defendant, at the time of the making of said warranty, and of the said sale, had full knowledge and notice, and the said plaintiff in fact says that he knowing and confiding in said warranty, did use and employ said gun, which but for said warranty he would not have done; and that afterward, to wit, on the day of , A. D. 18 , the said gun then being in the hands and use of said plaintiff, by reason and wholly in consequence of the weak, dangerous, and insufficient and unworkmanlike manufacture, construction, and materials thereof, then and whilst the said gun was so in use by the said plaintiff, burst and exploded, became shattered, and went to pieces; whereby and by reason whereof the plaintiff was greatly injured, cut, wounded, and maimed, and wholly by means of the premises, breach of duty, and improper conduct of the defendant, lost, and is forever deprived of the use of his hands, and other wrongs and injuries said plaintiff has sustained; to his damage $.

Wherefore plaintiff prays judgment against said defendant for said sum of $, his damages so sustained.

T R, Attorney for Plaintiff.

The above is a copy of the declaration in the case of Langridge *v.* Levy, 2 M. & W. 519; S. C., 4 M. & W. 337. If the father had been hurt instead of the son, he could have recovered on the contract of warranty; but the plaintiff (a son) was not a party to that contract, and therefore could not sue upon it. But as he bought the gun for the use of his sons, as well as of himself, Parke, B., says: "We are not prepared to rest the case upon one of the grounds on which the learned counsel for the plaintiff sought to support his right of action, namely, that wherever a duty is imposed upon a person by contract or otherwise, and that duty is violated, any one who is injured by the violation of it, may have a remedy against the wrong-doer. We think this action may be supported without laying down a principle which would lead to an indefinite extent of liability, so strongly put in the course of the argument on the part of the defendant; and we should pause before we made a precedent by our decision, which would be an authority for an action against the vendors, even of such instruments and articles as are dangerous in themselves, at the suit of *any person* whomsoever into whose hands they might happen to pass, and who should be injured thereby. If the instrument in question, which is not of itself dangerous, but which requires an

act to be done—that is, to be loaded—in order to make it so, had been simply delivered by the defendant, without any contract or representations on his part to the plaintiff, no action would have been maintainable for any subsequent damage which the plaintiff might have sustained by the use of it; but if it had been delivered by the defendant to the plaintiff for the purpose of being so used *by him*, with an accompanying representation to him he might *safely so use it*, and that representation had been *false to the defendant's knowledge*, and the plaintiff had acted upon the faith of its being true, and had received damages thereby, then there is no question but that an action would have lain, upon the principle of a numerous class of cases, of which the leading one is that of Polsby *v.* Freeman, 3 Term, 51; which principle is, that a mere naked falsehood is not enough to give a right of action; but if it is a falsehood, told with an intention that it should be acted upon by the party injured, and that act must produce damage to him; if, instead of being delivered to the plaintiff immediately, the instrument had been placed in the hands of a third person, *for the purpose of being delivered to, and then used by, the plaintiff*, the like false representation being knowingly made to the intermediate person to be communicated to the plaintiff, and the plaintiff had acted upon it, there can be no doubt but that the principle would equally apply, and the plaintiff would have his remedy for the deceit. Nor could it make any difference that the third person *also* was intended by the defendant to be deceived; nor does there seem to be any substantial distinction if the instrument is delivered, in order to be so used by the plaintiff, though it does not appear that the defendant intended the false representation itself to be communicated to him. There is a false representation made by the defendant, with a view that *the plaintiff should use the instrument* in a dangerous way, and, unless the representation had been made, the dangerous act would never have been done. . . . The defendant has knowingly sold the gun to the father, *for the purpose of being used by the plaintiff* by loading and discharging it, and has knowingly made a false warranty, that it might be safely done, in order to effect the sale; and the plaintiff, on the faith of that warranty, and believing it to be true, used the gun, and thereby sustained the damage which is the subject of this complaint." So the action was sustained. This judgment was sustained in the Exchequer Chamber, 4 M. & W. 337. Lord Denman, C. J.: "We affirm the judgment on the ground stated by Parke, B., that as there is fraud and damage, the result of that fraud not from an

act remote and consequential, but one contemplated by the defendant at the time as one of its results, the party guilty of the fraud is responsible to the party injured."

This case came up for consideration in Winterbottom *v.* Wright, 10 M. & W. 109. In this case A contracted with postmaster-general to provide a mail-coach to convey the mail-bags along a certain road; and B and others agreed to horse the coach along the line. B and his associates hired C to drive the coach; C was injured from the coach breaking down while he was driving the same, from latent defects. It was held he could not recover against A for the injury. Alderson, B., said: "The only safe rule is to confine the right to recover to those who enter into the contract; if we go one step beyond that, there is no reason why we should not go fifty. . . . Then it is urged that it falls within the principle of the case of Levy *v.* Langridge. But the principle of that case was simply this, that the father having bought the gun for the very purpose of being used by the plaintiff, the defendant made representations by which he was induced to use it." The case was pressed upon the court again in the case of Blakemore *v.* The Bristol and Exeter R. R. Co., 8 Ellis & Black. 1035; S. C., 92 Eng. C. L. 1035. In that case, the railroad had a crane for unloading stone at a station; the consignee was notified to unload certain stone consigned to him; in so doing, he used the crane, and, being defective, it broke and killed the plaintiff's intestate. It was held, that if the defendant had loaned the crane to intestate, the plaintiff might have recovered; and even if the intestate had been one the consignee had brought to aid in unloading, he might have recovered; but he was one who had no connection with the contract, having been induced, while unloading, to assist in so doing. The defendant did not know he was to aid, and hence he could not come within the scope of the original agreement. The principle, therefore, is this: If one contracts with another for a thing, with the understanding that it is got for the use of the buyer and these other persons, and false representations are knowingly made to induce the sale, both the buyer and the other persons who were to use it, may sue the vendor or lender for any injury sustained by reason of such defect. The reason of the rule is that these parties all come within the scope of the agreement, and the defendant knows that they may all use it on reliance upon this representation. In the last case, Blakemore was not present with the consignee and the two hands he brought with him, and the railroad agent did not know that he was to be employed; and hence he

could not recover. The same rule applies to a loan. In the French civil code act, 1871, the law is thus declared: "When a thing which has been loaned has such defects that it may cause an injury to him who makes use of it, the lender is responsible, if he knew of the defects and did not notify the borrower." This was applied in the last case as good law, as all our law upon bailment came from the civil law.

211. IN KILLING A FETTERED ASS.

The said A B, plaintiff, complains of the said C D, defendant, for that before and at the time of the committing of the grievances thereinafter mentioned, to wit, on the day of A. D. 18 , the said plaintiff was lawfully possessed of a certain donkey, (or, horse, cow, ox, or other animal, *as the case may be*,) which said donkey of the plaintiff was then lawfully in a certain highway, and that the said defendant was then possessed of a certain wagon and certain horses of the defendant drawing the same, which said wagon and horses of the defendant were then under the care, government, and direction of one E F, then being the servant and in the employ of said defendant, in and along the said highway; nevertheless the defendant, by his said servant, so carelessly, negligently, unskillfully, and improperly governed and directed his said wagon and horses that, by and through the carelessness, negligence, unskillfulness, and improper conduct of said defendant, by his said servant, the said wagon and horses of the defendant then ran and struck with great violence against the said donkey of the plaintiff, and thereby then wounded, crushed, and killed the same; to the damage of said plaintiff $.

Wherefore plaintiff prays judgment against said defendant for said sum of $, his damages so as aforesaid suffered and sustained.

E F, Attorney for Plaintiff.

The above form is taken from the report of the case of Davies *v.* Mann, 4 Mees. & Wels. 546. The donkey was fettered and turned into the highway, where he might lawfully be; at least it was so averred and not denied. It was claimed by defendant that here was negligence on the part of the plaintiff in turning out a fettered donkey into the road, whereby it could not easily get out of the way. Erskine, J., charged the jury that, though the act of the plaintiff, in leaving the donkey on the highway so fettered as to prevent his getting out of the way of carriages traveling along it, might be illegal; still, if the proximate cause of the injury was attributable

to the want of proper conduct on the part of the driver of the wagon, the action was maintainable against the defendant; and that, if they thought that the accident might have been avoided by the exercise of ordinary care on the part of the driver, to find for the plaintiff. The jury found for the plaintiff. On a motion for a new trial, Lord Abinger, C. B., said: "I am of opinion that there ought to be no rule in this case. The defendant has not denied that the ass was lawfully in the highway, and therefore we must assume it to have been lawfully there; but even were it otherwise, it would have made no difference; for, as the defendant might, by proper care, have avoided injuring the animal, and did not, he is liable for the consequences of his negligence, though the animal may have been improperly there." Parke, B., said: "This subject was fully considered by this court in the case of Bridge *v.* The Grand Junction Railway Co., 3 Mees. & Wels. 246, where, as appears to me, the correct rule is laid down concerning negligence, namely, that the negligence which is to preclude a plaintiff from recovering in an action of this nature, must be such as that he could by ordinary care have avoided the consequences of the defendant's negligence. I am reported to have said in that case, and I believe quite correctly, that the rule of law is laid down with perfect correctness in the case of Butterfield *v.* Forrester, 11 East, 60, that, although there may have been negligence on the part of the plaintiff, yet, unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover. If, by ordinary care, he might have avoided them, he is the author of his own wrong." He then states the charge, and proceeds: "All that is perfectly correct; for, although the ass may have been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief. Were this not so, a man might justify the driving over goods left on a public highway, or over a man lying asleep there, or the purposely running against a carriage on the wrong side of the road."

The rule where negligence on the part of the plaintiff will prevent a recovery, is a negligence occurring at the time of the accident, as where one is injured by an obstruction in the highway. He can not recover if he, by proper care, might have avoided the accident. Butterfield *v.* Forrester, 11 East, 60. Or in the case of the collision of vessels or steamboats. Here both parties are acting, and if the collision happens from the fault of both, neither can recover. Vinnall *v.* Garner, 1 Cr. & M. 21; S. P., Simpson *v.*

Hand, 6 Wharton, 311; Rathburn *v.* Payne, 19 Wend. 399; Barnes *v.* Cole, 21 Ib. 188; Hatfield *v.* Rover, 21 Ib. 615. But, in Brownell *v.* Flayler, 5 Hill, 282, it was held that even where there had been mutual neglect, the plaintiff might recover, if the evidence showed *intentional* wrong on the part of the defendant. B. & I. R. R. Co. *v.* Snyder, 18 Ohio St. 399; Beisiegel *v.* N. Y. Central, 40 N. Y. 9; Kerwhacker *v.* Cin., Col. & Clev. R. R. Co., 3 Ohio St. 172; Timmons *v.* The Central Ohio R. R. Co., 6 Ib. 105, per Scott, J.; 6 Ib. 109. In Trow *v.* Vermont Central R. R. Co., 24 Vt. 487, the law is thus stated: "Where there has been mutual negligence, and the negligence of each party was the proximate cause of the injury, no action whatever can be sustained. In the use of the words, *proximate cause*, is meant negligence occurring at the time the injury happened. In such case, no action can be sustained by either, for the reason that as there can be no apportionment of damages, there can be no recovery. *Vide* also Puterbaugh *v.* Reasor, 9 Ohio St. 484; Wilcox *v.* Rome, W. & Og. R. R. Co., 39 N. Y. 358; Dickson *v.* McCoy, 39 N. Y. 400.

212. ALLOWING WATER FROM A ROAD TO FLOW INTO A COLLIERY.

The said A B, plaintiff, complains of the said C D, defendant, for that the said plaintiff, before the committing of the grievances hereinafter mentioned, to wit, on the day of , A. D. 18 , was possessed of certain real estate situate in said county of , to wit, (*here describe the premises.*) together with certain coal mines, worked under and in said premises, and certain tools used in working said mine, and that said defendant was the owner of a certain turnpike road, running from to , and over and across and adjoining the premises of said plaintiff; and that said defendant was bound to keep said turnpike in such repair and condition as to carry off the water running on and over the same; yet the said plaintiff saith that said defendant so negligently, carelessly, wrongfully, and improperly conducted itself in and about improving, maintaining, and keeping in repair said turnpike road, running as aforesaid, by making and keeping manifestly insufficient drains and catch-pits for carrying off the water accumulating and running in and along the said road into the adjoining land, that, by means of such negligent, careless, wrongful, and improper conduct, large quantities of water ran from said road into the adjoining collieries of the plaintiff, whereby the said land and collieries had been and were injured and damaged; and the said plaintiff has been and was prevented from working the said col-

lieries, and thereby has lost large gains and profits, which he otherwise would have made, and has been put to great expense in and about pumping the water out of said collieries and putting the same again into working order; and thereby large quantities of mining tools, apparatus, and stock, used with and in the working of said collieries, have been and were injured and destroyed and lost to the said plaintiff; to his damage $.

Wherefore he prays judgment against said defendant for said $, his damages so as aforesaid sustained.

D B H, Attorney for Plaintiff.

This form is taken from the case of Whitehouse *v.* Fellows, 10 C. B., N. S. 765; S. C., 100 Eng. C. L. 765.

213. RESPONDEAT SUPERIOR.

The said A B. plaintiff, complains of the said C D, defendant, for that the said plaintiff, on the day of , A. D. 18 , was proceeding along a certain highway, in , in said county of , with a certain wagon drawn by three horses, the property of E F, his master, and on the proper side thereof, as he had a right to do; and that the said defendant with one G H, his groom, was coming on horseback in a direction contrary to the direction in which the plaintiff was going; and that the plaintiff was on foot walking at the head of the leading horse; and that the said G H, in order to keep up with the said E F, negligently, carelessly, and wrongfully struck his spurs into the horse so by him being rode, and when said horse was within a short distance of plaintiff, to wit, within feet of said plaintiff, the said horse then kicked back with his hind feet and hit the plaintiff and knocked him down, and thereby injuring him in this, to wit: (*here set out injuries received,*) to the damage of the plaintiff $.

Wherefore he prays judgment against said defendant for said sum of $, his damages so sustained.

A C, Attorney for Plaintiff.

This form is made up from the case of North *v.* Smith, 10 C. B., N. S. 572; S. C., 100 Eng. C. L. 572. The court held that the spurring the horse when so near plaintiff was negligence, and that the master was liable. In Gibbons *v.* Pepper, 1 Ld. Raym. 38; 4 Mod. 404; 1 Salk. 637, the court said: "If I ride upon a horse, and T S whips his horse, so that he runs away with me and runs over any other person, he who whipped the horse is guilty of the bat-

tery, and not me. But, if I by spurring was the cause of such accident, then I am guilty."

Williams, J.: "If there was negligence at all, it was upon the principle that a man has been held liable for spurring a spirited horse in the midst of a crowd, or the permitting a fettered ass to lie in a dark and narrow lane, so that a person riding by fell over it." Davies *v.* Mann, 10 Mees. & Wels. 546.

214. NEGLIGENCE IN LEAVING HOLE OPEN ON A VESSEL.

The said A B, plaintiff, complains of the said C D, defendant, for that before and at the time of committing the grievances hereinafter mentioned, the defendant was possessed of a certain vessel (or, steamboat,) called the , lying in a dock belonging to , (or, lying at the landing in the port of , in the county of and State of ,) and that the plaintiff was then master of and in charge of another ship (or, steamboat,) called the , lying in the same dock, (or, at the same landing,) along side of the said , and by reason of the lying between the quay of the dock (or, the landing,) and the said , so that without passing over the decks of the said it was impossible for persons on board of the said conveniently to reach the shore; and that the said plaintiff being the person in charge of the said was, by the usage of the said docks, (or, by the custom among steamboats so lying,) entitled as of right at all times, at his own will and pleasure, to pass over and across the decks of the defendant's ship, (or, steamboat,) the , for the purpose of passing to and from the shore, as the said defendant then well knew; yet the said defendant, disregarding his duty in that behalf, on the day of , A. D. 18 , negligently, carelessly, and improperly removed the hatches from one of the hatchways leading into the hold of the said vessel, (or, steamboat,) in the direct course in which persons passing from the to the shore were in the habit of passing and must necessarily pass, and allowed said hatches to remain off after dark, and the hatchway to remain and be unguarded and unfenced; whereby, and by reason thereof, the said plaintiff having occasion at night and after dark to pass from his ship, the said , to the shore over the decks of the ship of the said defendant, the said , fell down the said hatchway without any default on his part, and was precipitated through the same into the hold of the said , and by means of the premises the plaintiff was greatly hurt, bruised, and injured in this, to wit, (*here set out the injuries sustained and any*

expense in doctors, nurses, and loss of time;) to the damage of the plaintiff $.

Wherefore the plaintiff prays judgment against said defendant for the said sum of $, his damages so as aforesaid sustained.

A B, Attorney for Plaintiff.

The above form is taken from the report of the case of Hibbs *v.* Ross, L. R., 1 Q. B. 534. This form may be shaped to suit any case, where one in passing through the building or over the ground of another, gets hurt by an opening or other obstruction being carelessly left there, where he had a right to go and pass, or was accustomed to pass with knowledge and consent of the party guilty of the negligence. In this case, it was held by Blackburn and Lush, JJ., Miller dissenting, that the register of the vessel was *prima facie* evidence for the jury from which they might draw the inference that the persons in charge of the ship were employed by the defendant, the register showing the name of defendant as owner. The vessel at the time of the accident was in charge of a ship-keeper. The cases are numerous as to the effect of the register of a vessel upon the liability of the party, whose name appears in it. In Cox *v.* Reid, Ry. & Mood. 119, and in Fletcher *v.* Reid, Ry. & Mood. 202, n., both Best, C. J., and Lord Gifford held that the register was *prima facie* evidence of liability for repairs ordered by the captain against the person appearing on the register as owner. Frost *v.* Oliver, 2 E. & B. 301; Mitchison *v.* Oliver, 5 E. & B. 419; Hackwood *v.* Lyall, 17 C. B. 125. Blackburn, J., in the case of Hibbs *v.* Ross, *supra*, said: "In all cases in which the owners of a ship are sought to be made liable, either in contract for necessaries supplied on the order of the captain, or in cases of collision for the negligence of the crew, or, as in the present case, for the negligence of the ship-keeper, I think that the question really is, whether the persons sought to be charged were the employers of the captain, who made the contract, or the masters of the persons, who were guilty of the negligence; and that the liability does not depend on the title to the ship. In cases of contract, a further question sometimes arises, as to whether the ship-owner may not have clothed the master with apparent authority, so as to be precluded from disputing his authority; but in cases of tort, the question can only be whether he *in fact* employed those actually guilty of the negligence. But whilst agreeing that the ownership of the ship does not render the owners liable, either in contract or tort, for the acts of the master and crew, or other persons in charge of the vessel,

unless the owners are the employers of those persons, I think that the ownership is a very important piece of evidence, tending to show that the persons who are proved to be the owners of the ship, are, in fact, the employers of those who have the custody of the ship. Ships are most commonly in the employment of the owners; and consequently proof of ownership is evidence tending to prove that the persons proved to be owners of the ship are the employers of those who have the actual custody of the ship; and the register being evidence in whom the title of the ship is, I think evidence, that the registered owners are in possession and employ those having the actual custody, is competent. It is by no means conclusive."

The opinion of Blackburn, J., is a very elaborate one, and thoroughly discusses the whole question on authority and principle.

215. FOR SETTING FIRE TO BUILDING.

The said A B, plaintiff, complains of the said , for that the said defendant is a corporation duly organized under the laws of the State of , for the purpose of constructing and running a railroad from to , in the said State of , and that at and before the committing of the wrongs and grievances hereinafter mentioned, the said defendant owned and used a line of railroad running from to , in the State of , with its locomotives and cars, and that said line ran through (or, into,) the city of , in said State of , and there had certain switches and side-tracks in the streets of said , on and along which it was accustomed to run its locomotives and cars; and the plaintiff further saith that, on the day of , A. D. 18 , he was the owner and occupier of a certain dwelling-house, (or, tavern, warehouse, etc., *as the case may be*,) situated on street, in said , with a large quantity of furniture, clothing, and other goods used with said house and by the family of said plaintiff residing therein, and that there was then a side-track of said railroad laid down and in use along said street, and in front of the dwelling-house of said plaintiff, of all which the defendant had notice; and that on said day of , A. D. 18 , the said defendant, by its agents and servants, so negligently, carelessly, and improperly ran and conducted a locomotive of said defendant along said side-track in said street, and in and near the front of the said dwelling-house of said plaintiff, that the sparks, carelessly and negligently allowed to issue from the chimney of said locomotive, did, by the carelessness, negligence, and improper man-

agement of said locomotive, by the agents and servants of the defendant, set fire to and burn the said dwelling-house of plaintiff, together with the said furniture, clothing, and goods therein; being to the damage of the plaintiff $.

Wherefore plaintiff prays judgment against said defendant for said sum of $, his damages so as aforesaid sustained.

N L, Attorney for Plaintiff.

Carelessness in the use of fire, whereby the property of another is burned or injured, will sustain an action for damages by the party injured against the party guilty of the negligence. Thus, an action lies for carelessly and negligently kindling a fire on the defendant's own land, whereby the property of plaintiff on adjacent land was burnt. Barnard *v.* Poor, 21 Pick. 378; Mead *v.* Hammond, 1 Strange, 504. So, an action upon the case lies upon the general custom of the realm against the master of a house, if a fire be kindled there and consume the house or goods of another. 2 H. 4. 18; 1 Rol. 1 R.; 1 Com. Dig. 419. So, if a fire be kindled in a yard or close to burn stubble, and by negligence it burns corn, etc., in an adjoining close. R. 9, W. 3, B. R. between Turberville, and Stamp, Skin. 681; 1 Salk. 13; Comyn, 32. So, an action on the case lies for carelessly carrying fire, whereby the plaintiff's stock-yard was destroyed; but not for an accidental burning. Maul *v.* Wilson, 2 Harring. 443. In the case of Fero *v.* Buffalo and State Line R. R. Co., 22 N. Y. 209, this doctrine was applied to the burning of a house from the sparks of a locomotive. Bacon, J., says: "Some of the English cases have gone the length of holding that the very fact that buildings in proximity to a railroad have been fired by sparks from a locomotive is sufficient to warrant a jury in inferring and presuming negligence without further proof. But I think we have not carried the rule in this country to that extent, and certainly not in this State. The reason given is that the use of fire to create the motive power of a railroad engine is not only lawful, but necessary, and sparks may escape, notwithstanding the safeguards which science and skill have employed to limit their range. Sheldon *v.* Hudson River R. R. Co., 4 Kern. 218. There must be, therefore, some proof of negligence to create a liability arising from the exercise of a conceded right in an improper or unreasonable manner."

A similar case is reported in 44 N. Y. 367, Bedell *v.* Long Island R. R. Co. Speaking of what is evidence of negligence, Earl, Commissioner, says: "The mere fact that large sparks were emitted

from the engine in such profusion, and were carried to such a distance as to set fire to adjoining fences and buildings, is sufficient to show that there was carelessness, as common observation and experience teach that engines can be and are run through the country without such dangerous consequences. There was, however, evidence that a spark arrester had been used upon the smoke-pipe of this engine before and after the accident, and that while thus used there was no damage from the sparks. . . . It is enough that the evidence tended to show that this engine could not with safety be run near dwellings without this appendage, and that it could be with it; and hence ordinary prudence required its use."

The courts have also decided that, if the sparks from a locomotive set A's house on fire, and the fire from that sets fire to and burns B's house, the railroad is responsible to B for his loss. The railroad is to be held responsible for losses, if the loss is the natural consequence of its alleged carelessness, which might have been foreseen by any reasonable person; but it is not to be held responsible for injuries which could not have been foreseen or expected as the result of its negligence. Kent *v.* Toledo, Peoria and Warsaw R. R. Co., decided by the Supreme Court of Illinois, June 28, 1872; T. P. & W. R. R. Co. *v.* Pindar, 53 Ill. 451; S. C., 5 Am. 57; Kellogg *v.* R. R. Co., 26 Wis. 225; contra, Ryan *v.* R. R. Co., 35 N. Y. 210; Penn. R. R. Co. *v.* Kerr, 62 Penn. St. 353; S. C., 1 Am. 431. The ground of these last cases is that the damages are too remote. Yet, the case of Vaughn *v.* Menlove, 32 Eng. C. L. 613, was that of a spontaneous combustion of a hay-rick. The rick was burned, the owner's buildings were destroyed, and thence the fire spread to the plaintiff's cottage, and it was also consumed. The defendant was held liable. 5 M. & S. 198; Lynch *v.* Nurdin, 1 Ad. & Ellis, N. S. 29; Illidge *v.* Goodin, 5 Car. & P. 190; Thomas *v.* Winchester, 2 Selden, 408; 5 Am. 309, 341, 412; Piggot *v.* Eastern Counties R. R. Co., 54 Eng. C. L. 229; Smith *v.* London and Southwestern R. R. Co., L. R., 6 C. B. 98. The courts of New York and Pennsylvania stand alone on this question. It would seem that if two buildings stand so near together that, if one burns, the other in all human probability will also burn, the company should be liable; the loss of the second is the natural result of the burning of the first, and so comes within the rule of damages.

216. FOR SUFFERING SNOW ON ROOF WHEREBY IT FELL OFF AND INJURED ONE.

The said A B, plaintiff, complains of said C D, the defendant, for that the said defendant was the owner of a building situate on and adjoining to street, in the city of , in said county of , and that in front of said building and along said street there was a sidewalk, along and over which persons were accustomed to go and come at all times and at all hours of the day, of which said defendant had notice; and that said defendant, not regarding his duty in that behalf, did, on the day of , A. D. 18 , and before that time, carelessly and negligently suffer and permit large masses of snow and ice to accumulate and remain on the roof of said building, so that the same was dangerous to persons passing on said sidewalk, as the same was liable to slide therefrom in and upon said sidewalk, to the injury of persons passing along in front of said building, of all which said defendant had notice; and said plaintiff further saith that on the day of , A. D. 18 , he, said plaintiff, was passing along the sidewalk in front of said building, as he lawfully might, and that said snow and ice, through the carelessness and neglect of said defendant, slid down from the roof of said building, in and upon the said plaintiff so lawfully being on said sidewalk, and in and upon said sidewalk, whereby and by reason thereof the said plaintiff was thrown down upon said sidewalk, and greatly injured in his head and other parts of his body, (*here state what the injuries are, and what expenses put to;*) to the damage of said plaintiff $.

Wherefore he prays judgment against said defendant for said sum of $, his damages so as aforesaid sustained.

H L, Attorney for Plaintiff.

This form is prepared from the case of Shipley *v.* Fifty Association, 101 Mass. 251; S. C., 3 Am. 346; Dygert *v.* Schenck, 23 Wend. 447. "The principle," say the court, "stated by Lord Cranworth in Ryland *v.* Fletcher, L. R., 3 H. L. 330, 'that if a person brings or accumulates on his land anything which, if it shall escape, may cause damage to his neighbor, he does so at his peril,' is applicable to this case. In that case, the defendant had accumulated water in a reservoir, to work his mill; it escaped, and injured his neighbor's coal mine, because the defendant's engineer had neglected to block up certain shafts that led from the reservoir to the mine; and the defendant was held liable. He had a right to accumulate the water on his premises in that case, as the defendant had a

right in this case to accumulate the snow, but he was bound to use due care to prevent it from escaping and injuring his neighbor."

In this case, the landlord was held liable, the building being occupied by a tenant. The general principle undoubtedly is, that a landlord is not liable for a nuisance which is caused by the act or neglect of his tenant. Kirby *v.* Boylston Market Association, 14 Gray, 249. If the whole of the building in this case had been rented, the question might arise whether the nuisance consisted in the roof, which, at the time of making the lease, was so constructed as to collect snow and ice and project it into the street, or in the neglect of the occupant to remove it at a proper time and in a proper manner. But it does not appear that the place where the snow and ice accumulated was under the control of the tenant." Millford *v.* Holbrook, 9 Allen, 17.

A landlord and tenant may be joined in an action for a nuisance, or the landlord alone, where the property has been leased for a purpose which of itself is, or is liable to become, a nuisance. Pickard *v.* Collins, 23 Barb. S. C. 444; Owings *v.* Jones, 9 Md. 108; L. T., 1 Q. B. 702; Rex *v.* Pelley, 1 A. & E. 822. On the general doctrine of negligence on part of plaintiff, see Murphy and wife *v.* Dean et al., 101 Mass. 455; Tuff *v.* Warman, 5 C. B., N. S. 573; London, Brighton and South Coast Railway Co. *v.* Walton, 14 Law Times, N. S. 253; S. C., Harr. & Ruth. 424; Scott *v.* Dublin and Wicklow Railway Co., 11 Irish C. L. 377; Greenland *v.* Chaplin, 5 Exch. 248; Dowell *v.* Genl. Steam Nav. Co., 5 E. & Bl. 195; Bridge *v.* Grand Junction Railway Co., 3 M. & W. 244; Johnson *v.* H. River R. R. Co., 20 N. Y. 65; 24 Vt. 487; 19 Conn. 566; 6 Gray, 64; 22 Vt. 213; 9 El. & Bl. 719; Oliver *v.* Worcester, 102 Mass. 489; S. C., 3 Am. 485.

217. IN CARRYING ANIMALS.

The said A B, plaintiff, complains of said , a railroad corporation duly organized under the law of the State of for that the said defendant, before and at the time of the committing of the wrongs and grievances hereinafter mentioned by said defendant, was a common carrier by railroad of cattle, sheep, hogs, and horses, and other animals, for a certain price or reward to be paid to said defendant in that behalf, and being such common carrier of cattle, sheep, hogs, and other animals for hire as aforesaid, the said plaintiff did, on the day of , A. D. 18 , at , in the county of and State of , cause to be delivered to the said defendants, and the said defendants did then and there re-

ceive from said plaintiff divers, to wit, (*here state the number and kind of the animals delivered,*) of the plaintiff of great value, to wit, of the value of $, to be carried and conveyed by the said defendants from said , to the depot of said defendant in the city of , in the State of, (*or,* at the depot of [*another road*] in the city of ,) without any default and negligence on the part of said defendant, and there, to wit, at the depot of said defendant in said city of , without any unreasonable delay on part of said defendant, to be by said defendant delivered to said plaintiff, (*to whoever is consignee;*)* yet the said plaintiff saith that said defendant, not regarding his duty in that behalf, did not use due and proper care in and about the carrying and conveying of the said of said plaintiff , but so carelessly, negligently, and improperly conducted itself in the carriage and conveyance of said of the plaintiff, that the cars in which said of plaintiff were placed, were thrown off the track of the railroad of said defendants, and cast with great violence against the ground, whereby (*here give number killed*) of said of plaintiff were killed and the rest thereof greatly injured, wounded, and their limbs broken, whereby the same became and were utterly worthless to the plaintiff; to his damage $.

Wherefore he prays judgment against said defendant for said sum of $, his damages so as aforesaid sustained.

E T, Attorney for Plaintiff.

218. WHERE CARS ARE INSUFFICIENT.

(*Proceed in the other to* *, *and then proceed as follows:*) yet the said defendant, not regarding his duty in that behalf, did not furnish good and roadworthy cars in which said of said plaintiff were placed, to be carried and conveyed so as aforesaid mentioned, but did place said of the said plaintiff in cars that were defective, out of repair, and not good and roadworthy in this, to wit, (*here state the specific imperfection,*) whereby and by reason thereof the wheels of said cars gave way, and said cars so containing said of plaintiff, were thrown from the track and rails of said railroad, and broken and smashed up, and of said killed, and the rest so injured, wounded, and bruised, that the same became and were worthless to the said plaintiff; to his damage $

219. WHERE THERE HAS BEEN INJURY FROM DELAY.

(*Proceed as in the first to the* *, *and then proceed as follows:*) yet the said defendant, not regarding his duty in that behalf, did so negligently, carelessly, and improperly conduct itself in and about the carriage and conveyance of said of the plaintiff, that said did not arrive without unreasonable delay at (*the place of delivery,*) but the plaintiff avers that said defendant did, through its own default and negligence, fail to reach said in due time as it ought, by days; whereby said were greatly depreciated in value by the unreasonably protracted delay, and also suffered greatly for the want of food and water by reason thereof, and by the fall of cents per pound in the price of , at said place of delivery, between the day when by due diligence said ought to have been there delivered, and the time when the same were delivered and received by the plaintiff, to wit, on the day of , A. D. 18 , to the damage of the plaintiff $.

Prayer as above.

The law in regard to the carriage of live animals, is different from what it is in regard to dead freight. In the latter case, the carrier is an insurer against all injuries, save those arising by the act of God or public enemies; but in the former case, the carrier is only liable for neglect. He is bound to furnish a substantial and roadworthy locomotive and cars, and not to overload the motive power, and not unreasonably to delay in delivering the animals at the point of destination, and to run its trains without neglect. Cattle, horses, etc., are liable to injure each other in various ways, and they must be attended to, and fed and watered while on the way. If the animals are injured from either of the causes, the carrier is not liable; still, courts are strict in requiring proof that there has been no neglect, when a *prima facie* case is once made out.

This question is ably discussed in the case of the Mich. South. & N. Ind. R. R. Co. *v.* McDonough, 21 Mich. 165; S. C., 4 Am. 466; *vide* also Carr *v.* Lancashire & York R. W. Co., 7 Exch. 712; Clarke *v.* Rochester & S. R. R. Co., 14 N. Y. 573; McManus *v.* Lancashire R. R. Co., 2 Hurl & Norm. 702; Palmer *v.* Grand Junction R. R. Co., 4 Mees. & Wels. 758; Oxlade *v.* Northeast R. R. Co., 15 C. B., N. S. 680; Pardington *v.* South Wales Co., 38 Eng. L. & Eq. 432; Naylor *v.* Mangles, 1 Esp. 109; Spear *v.* Hurtley, 3 Esp. 81; 3 Parsons on Contracts, 240; Sisson *v.* C. & T. R. R.,

14 Mich. 489; Walker *v.* London R. R. Co., Angell on Carriers, sec. 214; Johnson *v.* Midland R. R. Co., 4 Exch. 367; F. & Mech. Bank *v.* Champlain Trans. Co., 23 Vt. 186; 2 Redf. on Railways, 116; Brind *v.* Dale, 2 M. & W. 775.

The form here given is somewhat briefer than same in the reports. The petition there sets out the line of the road or rather its termini. But the liability arises out of the business of being a common carrier; hence it is enough to aver the defendant to be a common carrier by rail, then state the delivery and acceptance of the animals to be carried, and the point from and to which they are to be carried, and then the neglect by which the injury is done. There is a form in 4 Mees. & Wels. 748, which sets out the mode, and line of its road.

220. TURNING HORSE IN STREET OF CITY WHERE ONE IS INJURED BY HIM.

The said A B, plaintiff, complains of the said C D, defendant, for that the said defendant, on the day of , A. D. 18 , was possessed of a certain horse in the city of , in the county of , the said defendant then residing in said city; and so being possessed of said horse in said city, the said defendant did then and there negligently, carelessly, wrongfully, and improperly voluntarily turn said horse loose, and without any one to attend on said horse, into the streets of said city, along which large numbers of persons were constantly passing and repassing, as said defendant then knew; and that the said horse so sent out into the streets of said city ran against and over the said plaintiff, without any fault on his part, and thereby then and there knocked down said plaintiff, and greatly injured said plaintiff in this, to wit, (*here state the specific injuries sustained,*) and other wrongs and injuries to the plaintiff then and there did to him by said horse; to the damage of said plaintiff $.

Wherefore he prays judgment against said defendant for said sum of $, his damages so sustained.

W H, Attorney for Plaintiff.

This form is made up from the case of Dickson *v.* McCoy, 39 N. Y. 400. The court held it was negligence in the owner to turn out a horse into the street of a city, where numerous people are passing and repassing, and he therefore must be responsible for any injury he may inflict on any persons. It was not necessary to aver the horse was vicious in this case; the negligence consisted

in turning him out into the street of the city of Troy. This is sound sense and good law; no man can be allowed to turn any kind of a horse into the thronged streets of a city; there is danger to life in the very act. It is like throwing a stone in the street, where people are constantly passing and repassing; if he hit any one, he is guilty of trespass.

221. AGAINST RAILROAD FOR INJURY IN PASSING ANOTHER CAR.

The said A B, plaintiff, complains of the said , for that before and at the time of the happening of the grievances hereinafter mentioned, the said was a corporation duly organized under the laws of the State of , for the purpose of constructing and running a railroad from to , and was, at the time hereinafter mentioned, running a railroad over said line before named; and that, on the day of , A. D. 18 , the said plaintiff was a passenger, for a valuable consideration, on the cars of said defendant from the of to the of ; and that when within a short distance of , as the train was going east, the said car in which the said plaintiff was riding, by the carelessness of the said defendant came near to, and partly in contact with, another car of the defendant, then standing on the railroad track of defendant north of that on which the train on which plaintiff was going was moving, and near to it, and a stick or board, or other hard substance, by and through the negligence and carelessness of the defendant, was projecting from, and in some manner connected with, the said car so standing on the said north track; and as the car in which said plaintiff was riding was passing the car so standing on said north track, the said board, stick, or other hard substance came violently in contact with the arm and elbow of said plaintiff, and fractured and broke the same, and thereby greatly injured the said plaintiff, and compelled her to employ physicians, at great expense, to dress, adjust, and set said arm, so as aforesaid injured and broken (*in amputating it*), and in attending to and caring for such injury until the same was healed and restored as far as the same could be, and in paying for nurses to attend upon said plaintiff for a long space of time; to the damage of plaintiff $.

Wherefore plaintiff prays judgment against said defendant for said sum of $, her damages so sustained.

W X, Attorney for Plaintiff.

This form is prepared from the case of Holbrook *v.* U. & Sch.

R. R. Co., 12 N. Y. 236. The court say: "The boarding-cars were placed on the adjoining track by the defendant, and were occupied by workmen in its service; the plaintiff's arm was broken at the moment when the passenger-car, in which she sat, was opposite the boarding-cars. . . . There was nothing except the boarding-cars to which the thing which caused the injury could be attached. It was the duty of the defendant and its agents to keep the narrow space between the boarding-cars and the passenger-train clear and free from obstruction; this was not done. . . . The burden of showing that the injury was accidental, and without fault of the defendant, lies under the circumstances above stated on it."

222. NEGLIGENCE IN PUTTING DISEASED SHEEP WHERE OTHER SHEEP WERE.

The said A B, plaintiff, complains of the said C D, defendant, for that heretofore, to wit, on the day of , A. D. 18 , the said plaintiff was the owner in fee of the following lands and tenements situate in the county of , then lately purchased of said defendant, which said land and tenements were then and there suitable and proper lands for farming and for pasturing and raising and yarding sheep, and were free from any contagion or infection dangerous, noxious, or fatal to sheep or other stock, and being so the owner in fee of said premises, the said plaintiff heretofore, to wit, on the day and year aforesaid, at the township of , in said county of , at the special instance and request of said defendant and in consideration that said defendant would exercise proper care and prudence in and about said premises, and not commit or suffer to be committed any damage or injury to said premises or to the cattle, sheep, or horses of said plaintiff, and would not bring or introduce upon said premises any distemper, or contagious or infectious disease dangerous to sheep or cattle, did allow, permit, and suffer said defendant to occupy and remain in possession of said premises, and said defendant did occupy and remain possessed of said premises for a long space of time, to wit, from the day of , A. D. 18 , to the day of , A. D. 18 , whereby said defendant ought to have occupied said premises in a careful and prudent manner, and not committed himself, or suffer to be committed, any damage or injury to the same, or to the cattle or sheep of said plaintiff on said premises, or introduced, or permitted to be introduced, or brought upon said premises any sheep or other animals sick and diseased with any hurtful conta-

gious disease or sickness, which might or could be communicated to the sheep of the said plaintiff; yet the said defendant, not regarding his duty aforesaid in the premises, afterward, to wit, on the day of , A. D. 18 , and on divers and sundry other days and times between that day and the day of , A. D. 18 , negligently, carelessly, and willfully contriving craftily to injure and defraud said plaintiff in this behalf, did turn in, and caused to be turned in and upon said premises, and into the barnyard, sheepfold, and inclosure of said plaintiff, wherein the sheep of said plaintiff were then and immediately about to be pastured and yarded, a large number, to wit, hundred sheep, sick, diseased, and affected with a noxious, dangerous, and contagious disease, commonly known as the "scab," the said defendant then well knowing said sheep so turned in and upon said premises to be so diseased and sick as aforesaid; by reason whereof, and by and through the carelessness, negligence, and willfulness of said defendant, the said contagious disease was communicated to the sheep of said plaintiff, then there on said premises, as said defendant well knew at the time he so turned said diseased sheep thereon, so that, to wit, of plaintiff's sheep, of great value, to wit, of the value of $, became and were sick and disordered with said contagious disease, and great numbers, to wit, died thereby, and the rest of said sheep of said plaintiff, to wit, were rendered worthless to said plaintiff in consequence of said disease so communicated to them, so that said plaintiff wholly lost the use and benefit of and profit of said sheep, and was compelled to, and did pay out divers large sums of money, to wit, $, for medicine and nursing and care of said sheep; to the damage of the plaintiff $.

Wherefore said plaintiff prays judgment against said defendant for the sum of $, his damages so as aforesaid sustained.

E T, Attorney for Plaintiff.

The above is copied from the case of Eaton *v.* Winnie, 20 Mich. 156; S. C., 4 Am. 377. The court held the plaintiff entitled to recover on this state of facts upon the principle, "that if a party's own wrongful act has brought another into peril, he is not at liberty to impute the consequences of his acts to a want of negligence in the injured party, when his own conduct and untruthful assertions have deprived the other of that quality and produced a false sense of security. Upon this point, we content ourselves with referring to the case of Penn. R. R. Co. *v.* Ogier, 35 Penn. St. 72 Gordon *v.* Grand St. R. R. Co., 4 Barb. 550; and Ernst *v.* Hudson

River R. R. Co., 35 N. Y. 28, which fully support and illustrate the position here taken."

223. IN A PATENT AGENT.

The said A B, plaintiff, complains of the said C D, defendant, for that, on the day of , A. D. 18 , in consideration that the said plaintiff would employ the said defendant, as and being a patent agent, as his agent to procure, in the name of E F, certain letters patent for an invention of (*here state in general terms the object of the patent, as,* a new automaton vase, or depot for holding coals or other substances,) for reward to the defendant to be paid, the said defendant promised the said plaintiff that he would use due and proper care and skill in and about endeavoring to procure the said letters patent; and that the said plaintiff, relying on the promise of the said defendant, did employ the defendant as aforesaid, to wit, at the time aforesaid and on the terms aforesaid; and the said plaintiff avers that sufficient time has elapsed to entitle the said plaintiff to have the defendant do what he has as aforesaid promised to do, and to sue him, said defendant, for the breach of said promise hereinafter mentioned; yet the said defendant did not use due and proper care and skill in and about endeavoring to procure the said letters patent; but the said plaintiff avers that the said defendant so carelessly and negligently conducted himself in and about the said business of endeavoring to procure the said letters patent that he failed to procure the same through and by reason of his said carelessness and negligence; whereby the said plaintiff, to whom the said E F had agreed to assign the benefit of the invention and of the letters patent, when obtained, lost all the profits and benefit which would have accrued to him from the said letters patent, if the same had been granted; to the damage of said plaintiff $.

Wherefore said plaintiff prays judgment against said defendant for said sum of $, his damages so sustained.

H A T, Attorney for Plaintiff.

This form can easily be converted into one where the plaintiff is the patentee, by inserting the plaintiff's name in place of E F, and in leaving out the averment near the close as to the assignment, and make it read, "whereby the said plaintiff lost all profits," etc., leaving out what comes in between the words *plaintiff* and *lost*.

This form is taken from the report of the case of Lee *v.* Walker, L. R., 7 Common Pleas, 121; S. C., 1 Eng. R. 371. The negligence,

there was a delay by which another person obtained a patent for same thing, which he could not have done if the plaintiff's application had been filed when it should have been. *Vide* also L. R., 4 Ch. 577.

224. IN KEEPING A SEWER, SO THAT WATER CAME INTO CELLAR OF PLAINTIFF.

The said A B, plaintiff, complains of the said C D, defendant, for that the said plaintiff was possessed of a certain house and shop, with a certain cellar under the same, and thereto belonging, and in which house, shop, and cellar the said plaintiff then carried on his trade and business of a grocer; and that said defendant had, for his own accommodation and convenience, made and constructed, and, at the time of the happening of the wrong and injuries hereinafter mentioned, kept, and continued so made and constructed, a certain sewer or watercourse, in and under a certain street or highway near to the house, shop, and cellar of the plaintiff, and which sewer or watercourse was under the management and control of the said defendant, and into which said sewer or watercourse he, the said defendant, from time to time, caused and permitted large quantities of water to flow, and which said water then flowed and passed in and along the said sewer or watercourse and near to the said cellar of the plaintiff, of which the said defendant before and at the time of the committing of the grievances hereinafter mentioned had notice; yet the said defendant, not regarding his duty in that behalf, so negligently, insufficiently, and improperly made and constructed said sewer or watercourse, and, at the time of the commission of said grievance, kept and continued the same so negligently, insufficiently, and improperly made and constructed, and in such an insufficient and improper state, and did also, at the said time, so negligently and improperly manage said sewer or watercourse, and cause and permit such large and unreasonable quantities of water to flow into the same, that, on the day of , A. D. 18 , divers large quantities of water penetrated and burst through and flowed out of and from the said sewer or watercourse of said defendant into the said cellar of the plaintiff, and then greatly damaged and injured the same; and also then damaged and destroyed divers large quantities of groceries and other goods of the plaintiff, then lawfully being in said cellar, in the way of the plaintiff's said trade and business; to the damage of the plaintiff $

Wherefore plaintiff prays judgment against said defendant for said sum of $, his damages so as aforesaid sustained.

H A T, Attorney for Plaintiff.

This form is taken from the case of Alston *v.* Grant, 24 Eng. L. & Eq. 122. In this case the defendant had, more than twenty years before the action, constructed a sewer or watercourse through property of his own and then occupied by himself. In 1845, the defendant let a house and shop and cellar to the plaintiff, which the defendant down to that time also occupied with his property. In 1851, the sewer burst, and thereby the plaintiff's cellar and goods were damaged; and the plaintiff thereupon brought an action against defendant as aforesaid. The jury found that the sewer was not originally properly constructed and had been so continued. *Held*, that upon the letting of the premises to plaintiff, a duty arose on the part of the defendant to take care that that which before was rightful, did not become wrongful to the plaintiff, because that would be in derogation of the defendant's own demise to the plaintiff, and that upon this ground, as also upon the principle *sic utere tuo ut alienum non lædas*, the action was maintainable. Tenant *v.* Goldwin, 2 Ld. Raym. 1089; Vaughan *v.* Menlove, 3 Bing. N. C. 468; Cooper *v.* Barber, 3 Taunt. 99; Gale on Easm. 49; Robins *v.* Barnes, Hob. 131; Rich *v.* Basterfield, 4 Com. B. 783; Arden *v.* Pullen, 10 M. & W. 321.

The question of negligence is in one form or another constantly presenting itself. Within a few years these questions have been repeatedly before the courts and have received a most profound consideration. The liability of corporations, as well as of individuals, for the negligence of their servants, employes, and agents, has been discussed and most elaborately considered; an effort has been made to eliminate and state the principles on which cases are to be decided. Among these are the cases of The Mersey Docks and Harbor Board Trustees *v.* Gibbs and others, and The Same *v.* Penhallow and others, T. R., 1 House of Lords, 93; 3 H. & N. 164; 7 H. & N. 329. The case in its various stages received a most thorough discussion, and it was held that corporations were liable to the same extent as individuals, even though there were no stockholders, but it was composed of trustees having no personal interest in it. I will refer to some of the various cases on the subject. Parnaby *v.* The Lancaster Canal Co., 11 Ad. & El. 223; Duncan *v.* Findlater, 2 Cl. & Fin. 894; 11 H. L. C. 413; 11 Exch. 257; 5 H. & N. 719; 1 Ib. 439; 1 H. & N. 59; 2 Ib. 204; 3 Ib. 308; 2 Cl. & Fin. 331; 5 B.

& S. 440; 4 New R. 354; 1 H. & N. 439; 4 B. & Ad. 30; 4 Term, 794; 10 C. B., N. S. 779; 2 B. & S. 402; 6 Taunt. 29; 5 B. & A. 837; 6 Cl. & Fin. 894; 10 C. B., N. S. 480; 6 M. & W. 509; 2 Bing. 156; 8 El. & Bl. 801; 7 Ib. 426; 12 C. B., N. S. 790; 3 H. & N. 308; 10 C. B., N. S. 765; 13 Ib. 768; 16 Ib. 546; 1 Ld. Raym. 646; Cowp. 754; L. R., 7 Exch. 130; S. C., 1 Eng. 381; 6 Exch. 752; 5 E. & B. 856; 6 H. & N. 349; 7 Ib. 937; 1 B. & S. 437; L. R., 2 Q. B. 264; 34 N. Y. 79; 40 N. Y. 9, 34; 40 Ib. 145; 40 Ib. 138; 39 Ib. 61; 39 Ib. 358, 400; 38 Ib. 131, 260, 433, 440, 443, 455; 3 Keys, 263; 12 N. Y. 236, 425; 18 Ib. 79, 248; 94 Eng. C. L. 881; 1 C. B. 53; 2 C. B. 371; 1 C. B. 274, 291; 1 Q. B. 277, 711; 24 Eng. L. & Eq. 122; 2 C. B. 631; 3 C. B. 216, 326, 368, 422; 18 Ohio St. 256, 399, 492; 3 Eng. & Irish Ap. 320; 37 N. Y. 210, 287; 36 Ib. 39, 135, 153, 312, 378; 3 Q. B. 555, 733; 100 Eng. C. L. 572, 765; 96 Eng. C. L. 719, 168; 94 Ib. 573; 44 N. Y. 367, 459; 41 N. Y. 42; 6 N. Y. 397; 34 Ib. 527; 3 Ohio St. 172; 6 Ib. 105; 3 M. & W. 244; 10 Ib. 545; 8 Ohio St. 1, 10; 4 Ib. 576; 10 Ib. 69; 9 Ib. 484; 10 Ib. 118, 591; 5 Denio, 255; 22 Vt. 213; 19 Conn. 566; 12 Pick. 177; 89 Eng. C. L. 740; 35 N. Y. 516, 485; 34 N. Y. 670; 18 Ib. 422; 29 N. Y. 591; 30 Ib. 208, 370; 31 Ib. 314; 20 Ib. 65; 21 Ohio St. 212, 586; 20 Ib. 137, 150, 251, 337, 442; 19 Ib. 1, 221, 260; 18 Ib. 255, 343, 399, 492; 17 Ib. 197; 11 Ib. 333, 417.

The above authorities on negligence in its various forms may aid counsel in examining questions of this character. I find them noted by me in the margin of my copy of the Digest as I found them in reading.

225. FOR ISSUING EXECUTION AND MAKING LEVY WHEN NOTHING WAS DUE.

The said A B, plaintiff, complains of the said C D, defendant, for that the said defendant before the committing of the grievances hereinafter mentioned, to wit, on the day of , A. D. 18 , had obtained a judgment against the said plaintiff for the sum of $ debt, and $ costs, and the said plaintiff avers that afterward, and before the issuing of the execution as hereinafter stated, he paid to the said defendant the whole amount of said judgment and the costs thereon; yet the said defendant, then well knowing that said judgment and costs had been so paid, on the day of , A. D. 18 , wrongfully and illegally caused and procured an execution to be issued on said judgment, for the collection of the entire amount thereof and costs thereon, and then delivered the same to the sheriff of the said county of , and

procured him to levy the same on the goods and chattels of the said plaintiff, of the value of $, and afterward procured the said sheriff, on the day of , A. D. 18 , to sell said goods and chattels at public auction, and the said sheriff did then so sell said goods and chattels at a price much below the value thereof; whereby the said defendant was greatly damaged; to the damage of the said plaintiff $.

Wherefore the said plaintiff prays judgment against the said defendant for said sum of $, his damages so as aforesaid sustained.

226. AGAINST AN OFFICER FOR LEAVING PROPERTY LEVIED ON WITH THE PARTY, WHEREBY IT WAS LOST.

The said A B, plaintiff, complains of the said C D, defendant, for that the said plaintiff had, on the day of , A. D. 18 , obtained a judgment against one E F, in the Court of Common Pleas, within and for the county of , (or, before one , he, the said , then being a justice of the peace for the township of , in the county of ,) for the sum of $ debt, and $, his costs of suit; that the said plaintiff did, on the day of , A. D. 18 , cause an execution, to be issued from the said court, (or, by said justice of the peace,) directed to the said defendant, he, the said defendant, then being sheriff of the said county of , (or, he, the said defendant, then being constable of said township of ,) commanding him, as such officer, to levy the said sum of $, debt, and $, costs, of the goods and chattels of the said , and the said plaintiff then caused said execution to be delivered to the said defendant, and the said defendant then received the same, and afterward, and during the life of the same, levied the same upon the following goods and chattels of the said , *(here describe them;)* and the said defendant then left the said goods and chattels in the custody of the said E F, so that the said goods and chattels afterward, on the day of , A. D. 18 , were not produced and sold by the said defendant, according to an advertisement before that time duly given of the time and place for the selling of said goods and chattels; whereby the said goods and chattels became and were wholly lost, and the said plaintiff wholly unable to make his said judgment and costs against the said E F, he, the said E F, having no other goods or chattels, lands or tenements, whereon the said plaintiff could further levy to satisfy his said judgment and costs; to the damage of the said plaintiff $, *(the amount of the judgment and costs.)*

Wherefore the said plaintiff prays judgment against the said defendant for the said sum of $, his damages so as aforesaid sustained.

This is drawn from the case of Ohio for Smith *v.* Fuller et al., 14 Ohio, 545. It would seem that no averment need be made that the execution debtor had no further property, as the officer is liable for the property levied on. The damages will be the value of the property levied on. Ohio for Morgan *v.* Myers et al., 14 Ohio, 538. For not returning an execution, the plaintiff is entitled to the face of the execution *prima facie*. Ledyard *v.* Jones, 3 Selden, 550.

227. AGAINST A SHERIFF FOR ESCAPE.

The said A B, plaintiff, complains of the said C D, defendant, for that one E F was, on the day of , A. D. 18 , indebted to the said plaintiff in the sum of $; and the said plaintiff, on the said day of , A. D. 18 , commenced an action against the said E F, for the recovery of the said sum of $, in the Court of Common Pleas, within and for the county of , and the said plaintiff did then and there file his affidavit, and procure an order of arrest to be issued out of said court in the said action, addressed to the sheriff of the said county of , and caused the same, together with a copy of the said affidavit, to be delivered, on said day, to said defendant, he, the said defendant; then being sheriff of said county of , requiring said sheriff to arrest said E F, and to hold him to bail in double of said sum, and to return the same on the day of , A. D. 18 , with the undertaking of the bail, if any should be given; and the said plaintiff further saith that the said defendant did afterward, and before the said day of , A. D. 18 , (*the return day of the order of arrest,*) under and by virtue of the said order of arrest, arrest the said E F, in his body, and then had him in his custody, as such sheriff, at the suit of the said plaintiff in the action aforesaid; yet the said defendant did, on the day of , A. D. 18 , without the consent or license of the said plaintiff, voluntarily suffer and permit the said E F to escape and go at large, wheresoever he would, out of the custody of the said defendant, the said claim of the said plaintiff against the said E F then and still being wholly unpaid to the said plaintiff; whereby the said plaintiff hath been greatly damaged, and has lost his said claim against the said E F, he, the said E F, having absconded and gone beyond the jurisdiction of

this court, with all his moneys, goods, and effects; to the damage of the said plaintiff $, (*the amount of the claim and costs paid.*)

Wherefore the said plaintiff prays judgment against the said defendant for the said sum of $, his damages so as aforesaid sustained.

This form will serve as a guide in all cases. If the neglect consists in not arresting the party, the averment will be that he "did not, nor would, at any time before the return of said order of arrest, take, or cause to be taken, the said E F, but therein wholly failed and made default; whereby, etc."

If the neglect was on final process, the petition will state the recovery of the judgment, the application for the capias, its issue, and then the neglect, as in the last form, when for an escape; or as modified, when for a neglect to arrest.

Under the averment that he *voluntarily* suffered the party to escape, a negligent escape may be proved. 2 Term, 126; 5 Burr, 2814; 1 Saund. 35, note 1. Evidence of a *negligent* escape will support an action for a *voluntary* one. Skinner *v.* White, 9 N. H. 204. So an escape from the deputy may be declared on as an escape from sheriff. S. C., 9 N. H. 204.

What will excuse? Nothing but the act of God or public enemies. Fairchild *v.* Coxe, 24 Wend. 381; Rainey *v.* Dunning, 2 Murph. 386.

Formerly, in England, an action of *debt* was given by statute to persons injured by the escape of debtors in execution; and this is, perhaps, still the case in some of the States of the Union. Under the inflexible provisions of these statutes, it seems that the amount of the debt was the sole measure of the amount recoverable in an action of *debt* for an escape. But in this State we have never had any such statute, and the matter remains as at common law. The only reported case in this State bearing on the point, which I have been able to find, is that of Richardson *v.* Spencer, 6 Ohio, 13; where it was held that in an action on the case for an escape on final process, it is competent for the defendant to prove in mitigation of damages that the defendant had no property. In that case, the escape was involuntary, or at most negligent, on the part of the sheriff; and the court intimate that the rule of damages might be different, where the escape was voluntary; but that question was not before the court, and was not, therefore, and could not be, authoritatively passed upon. And the adjudged cases do not establish such a distinction. And although the rules of damages, in

actions on the case for escape, especially as relating to the burden of proof, still appear to be somewhat afloat in England, yet in this country the following rules seem now to be settled by the preponderating weight of authority:

1. On proving the judgment, arrest, and escape, the plaintiff is, *prima facie*, entitled to recover the whole amount of his debt.

2. To reduce the recovery below the amount of the debt due from the escaping prisoner, the *onus probandi* rests upon the defendant.

3. For this purpose the defendant may not show that the amount of the debt is still capable of being collected from the escaped prisoner; but may show his partial or total insolvency, or pecuniary worthlessness at the time of the escape.

4. That on proving judgment, arrest, and escape, the plaintiff, in all cases, is entitled to recover at least nominal damages.

5. Where the jury find the escape to have been not only voluntary, on the part of the officer, but that, in permitting the same, he was actuated by fraud, malice, or corruption, they are not restricted to the amount of pecuniary injury actually sustained, and may include reasonable exemplary damages, but with this exception, where evidence in mitigation is given, the actual injury sustained is the proper measure of recovery. Ib.

228. AGAINST A SHERIFF FOR FALSE RETURN.

The said A B, plaintiff, complains of the said C D, defendant, for that the said plaintiff, at the term of the Court of Common Pleas, within and for the county of , by the consideration of said court recovered a judgment against one E F for the sum of $, his claim, and $, his costs in said action expended, as by the said record thereof, in said court now remaining, appears, and which said judgment now remains in full force, unreversed and unpaid; and the said plaintiff further complains that he did afterward, on the day of , A. D. 18 , cause a certain execution to be issued on said judgment, directed to the sheriff of said county, commanding him that, of the goods and chattels of the said E F, he cause to be made the said sum of $, the debt, and $, costs, and $, increased costs, and for want of goods and chattels, he cause the same to be made of the lands and tenements of the said E F, and the said plaintiff caused to be indorsed on said execution the said sum of $, debt aforesaid, and $, the costs aforesaid, for which said judgment was entered; and the said plaintiff did, on the day of ,

A. D. 18 , cause said execution, so indorsed, to be delivered to the said defendant, he, the said defendant, then, and until after the return of said execution, being sheriff of said county of , and as such authorized and required to execute said writ of execution and the said defendant afterward, and before the time for the return of said writ of execution, seized and took, by virtue thereof divers goods and chattels of the said E F, in his said county found of the value of $, and then levied thereon; yet the said defendant, not regarding his duty in that behalf, afterward and before the return day of said writ of execution, falsely entered on said writ of execution, as his return thereto, that the said E F had in his county no goods or chattels, lands or tenements, found, whereon he could levy the said writ of execution, and make said sum of money thereby required to be made, as will, by his return, now on file in the office of the clerk of the said court remaining, appear; whereas the said plaintiff saith that the said E F had goods and chattels, lands and tenements, in said county, sufficient to satisfy the sums named in said writ of execution, and that the said defendant did levy the same on divers goods and chattels of the said E F, sufficient to satisfy said sums, and thereafter released the same; whereby the said plaintiff has lost his said claim, and has sustained damages to the amount of $.

Wherefore the said plaintiff prays judgment against the said defendant for the said sum of $, his damages so as aforesaid sustained.

If no levy was made, omit that averment, and aver that he "did not, nor would at any time before the return thereof, make the money aforesaid, or any part thereof, but wholly neglected and failed so to do, and at the return of said writ of execution, falsely returned to said court that the said E F," etc.

The rule of damages is, *prima facie*, the amount of the execution. It is not necessary for the plaintiff to allege or prove special damages. Ledyard *v.* Jones, 3 Selden, 550; Rome *v.* Curtiss, 1 Hill, 275; 6 Ib. 550; 9 Johns. 300; 10 Mass. 474.

229. AGAINST A WITNESS, FOR REFUSING TO ANSWER, OR ATTEND UNDER A SUBPENA.

The said A B, plaintiff, complains of the said C D, defendant, for that the said plaintiff, before the committing of the wrong by the said defendant hereinafter named, had caused the said defendant to be duly served with a subpena, commanding him to be and

appear before the Court of Common Pleas, within and for the said county of , on the day of the term thereof, A. D. 18 , there to give testimony in behalf of the said plaintiff in a certain case then and there pending, and to be tried, wherein the said plaintiff was plaintiff, and one E F was defendant; and the said plaintiff further saith that the said defendant, not regarding his duty in the premises, failed and willfully refused to appear, as he was by said writ of subpena commanded; but, on the contrary, willfully stayed away from said court; whereby the said plaintiff, when said action was called for trial, was compelled, for want of the testimony of said defendant, without whose testimony he could not safely proceed to the trial of said action, to move the said court there to continue the said action, and the said court did continue the same at the costs of the said plaintiff, and the said plaintiff saith that he was compelled to pay on said continuance, as costs thereof, the sum of $, which sum he was so compelled to pay by reason of the refusal of the said defendant to attend at the time aforesaid, and testify on said trial; to the damage of the said plaintiff $.

Wherefore the said plaintiff prays judgment against the said defendant for the said sum of $, his damages so as aforesaid sustained.

This action lies at common law. Douglass, 561; Peake, 60; 13 East, 15. In Warner *v.* Lucas, 10 Ohio, 336, it was held that an action might be sustained against a witness for willfully refusing to testify.

230. AGAINST THE JUDGES OF AN ELECTION, FOR REFUSING PLAINTIFF'S VOTE.

The said A B, plaintiff, complains of the said C D, E F, and G H, defendants, for that the said defendants were the judges of a certain election, held in and for the township of , in the county of , for the purpose of electing one justice of the peace within and for said township of , and that the said defendants, as such judges, did open the polls for said election at the town-house in said town of , at o'clock, on said day of , as aforesaid; that the said plaintiff was a citizen of said State of Ohio, and a resident and legal voter at the said election, in said township of , and, as such elector, the said plaintiff did, on the said day of , A. D. 18 , and whilst the said polls were still kept open by the said defendants, for the receiving of the votes of the

electors of said township at said election, offer his vote or ballot for the election of a justice of the peace as aforesaid, and requested the said defendants to receive the same; yet the said defendants, not regarding their duty in that behalf, then and there refused to receive the vote or ballot of the said plaintiff, whereby the said plaintiff was deprived of his right to vote at said election; to the damage of said plaintiff $.

Wherefore the said plaintiff prays judgment against the said defendant for the said sum of $, his damages so as aforesaid sustained.

The averment of malice is unnecessary. Jeffries *v.* Anthony et al., 11 Ohio. 372; Thatcher *v.* Hawk et al., 11 Ib. 376; Lincoln *v.* Hapgood, 11 Mass. 350; Cossen *v.* Foster et al., 12 Pick. 485; Osgood *v.* Bradley, 7 Greenl. 421. So, too, an action lies against school directors for refusing to permit a person's children to attend the public schools. Lane *v.* Baker et al., 12 Ohio, 237.

This form can be easily changed to adapt it to any election.

231. FOR CONVERSION OF GOODS.

The said A B, plaintiff, complains of the said C D, defendant, for that the said plaintiff, on the day of , A. D. 18 , was the owner and lawfully possessed of certain goods and chattels, to wit, (*here describe them,*) which goods and chattels, afterward, on the said day of , A. D. 18 , came to the possession of the said defendant; and the said defendant, contriving to injure the said plaintiff, did afterward, on the said day of , A. D. 18 , wrongfully convert the said goods and chattels, of the value of $, to his, the said defendant's, own use and benefit; to the damage of the said plaintiff $.

Wherefore the said plaintiff prays judgment against the said defendant for the said sum of $, his damages so as aforesaid sustained.

The goods must be specifically described. The following will serve as examples: (ten oxen, five cows, ten sheep, six horses, geldings, mares, two wagons, ten plows, ten bureaus, ten tables, fifty chairs, one flat-boat, one steamboat called the , one hundred yards of sheeting, of calico, of drilling, five pieces of broadcloth, etc.; a certain writing obligatory, called a bond, or sealed note, sealed with the seal of one N O, and dated on the

day of , A. D. 18 , whereby he, the said N O, bound himself to pay to the said plaintiff the sum of $, in days after date, or in months, or years from date, and then being in full force and unpaid; also, a certain bill of exchange, drawn by one E F, upon and accepted by the said defendant, or by one G H, bearing date, whereby the said E F requested the said (*acceptor*) to pay to the order of the said plaintiff the sum of $, in days after date, or at sight, *as fact is*, which bill is unpaid; and also a certain promissory note, dated on the day of , A. D. 18 , signed by one E F, whereby the said E F promised to pay to the said plaintiff, or order, $, in days, or months, or years after date, and which note is and was due and unpaid; and also five promissory notes, commonly called bank-notes, for the payment of money, and each of said bank-notes being for the payment of five dollars, and each of the value of five dollars; and also ten half-eagles, one double-eagle, and one eagle, of the current gold coins of the United States.)

It can hardly be claimed that this form will not answer. The facts constituting liability are, the ownership of the goods, the fact that they came to the possession of the defendant, and that he converted them to his own use. The only fiction allowed in a case would be an averment as to the finding. Unless this form be good, the plaintiff must declare specially in each case, and set forth all the *evidence* by which these three facts are to be proved. This would be very inconvenient, and tend to infinite difficulty and to an unnecessary enlargement of the record. The form in Kellogg *v.* Slauson, 1 Kernan, 302, merely avers that the defendant unlawfully took and converted the goods. But they may come lawfully to the possession of the defendant, and then that form would not answer.

The term *converted* has a fixed legal meaning, and therefore in using it, there can be no misunderstanding. It means such an act of ownership, exercised over the property of another, as authorizes one to sue and recover the value of it. If any other term or terms are used, no one can tell whether he has described acts which amount to a conversion, until the court has passed upon them. This term also will shorten pleadings very much, which is an object of the code, or ought to have been.

232. COUNT BY ADMINISTRATOR FOR CONVERSION.

The said A B. plaintiff, administrator of the estate of E F, deceased. complains of the said C D, defendant, for that the said E F, in his lifetime, was owner and possessed of the following goods and chattels, to wit, (*here describe them,*) of the value of $, and the said goods and chattels afterward, and during the life of the said E F, came to the possession and custody of the said defendant; and the said defendant afterward, and during the lifetime of the said E F, well knowing that said goods and chattels were the property of the said E F, refused and neglected to deliver the same to the said E F in his lifetime, nor hath the said defendant delivered the same, nor any part thereof, to the said plaintiff, since the death of the said E F, but did wrongfully, in the lifetime of the said E F, convert the same to the use of himself, the said defendant; to the damage of the said plaintiff $

Wherefore the said plaintiff prays judgment against the said defendant for the said sum of $, his damages so by the said E F in his lifetime sustained.

When the conversion is after the death of the owner, the averment of conversion may be in this form: (but the said defendant did, after the death of the said E F, on the day of , A. D. 18 , wrongfully convert and dispose of said goods and chattels to his own use.)

233. FOR TRESPASS TO PERSON.

The said A B, plaintiff, complains of the said C D, defendant, for that the said defendant, on the day of , A. D. 18 , did unlawfully and with force assault the said plaintiff, and then and there beat, bruise, and wound the said plaintiff, by throwing him, the said plaintiff, on the ground, and then and there striking him sundry blows with a stick, which he, the said defendant, then and there had; and violently kicking the said plaintiff in and upon his right side, and breaking two of the ribs of the said plaintiff, and other wrongs then doing to the said plaintiff; to the damage of the said plaintiff $.

Wherefore the said plaintiff prays judgment against the said defendant for the said sum of $, his damages so as aforesaid sustained.

If special damages have been sustained, they must be set forth. After setting forth the assault, and before the averment of other

wrongs, it can be stated in this form: (whereby the said plaintiff became and was sick, lame, and unable to attend to his lawful business, for the space of weeks; and was compelled to expend and did expend and pay out, the sum of $, in and about the nursing of said plaintiff, in endeavoring to be cured of the said soreness, bruises, and wounds, so as aforesaid occasioned; to the damage, etc.)

If the plaintiff's clothes were torn, that averment may be inserted with the others before the words "other wrongs," (and the said defendant did also, with great force, rend and tear the pantaloons, waistcoat, the coat, and the shirt of said defendant, of the value of $, which the said plaintiff then wore and was clothed with.)

234. FOR COMMON ASSAULT.

The said A B, plaintiff, complains of the said C D, defendant, for that the said C D did, on the day of A. D. 18 , unlawfully and with force, assault the said plaintiff, and then and there beat and ill-treated the said plaintiff, and other wrongs then and there did to the said plaintiff; to his damage $.

Wherefore the said plaintiff prays judgment against the said defendant for the said sum of $, his damages so as aforesaid sustained.

235. HUSBAND AND WIFE, FOR INJURY TO WIFE.

The said A B, and E, the wife of the said A B, plaintiffs, complain of the said C D, defendant, for that the said defendant, on the day of , A. D. 18 , unlawfully and with force, assaulted the said E, then and still being the wife of the said A B, and then and there beat, bruised, wounded, and ill-treated her, and other wrongs then to her did; to the damage of the said plaintiffs $.

Wherefore the said plaintiffs pray judgment against the said defendant for the said sum of $, their damages so as aforesaid sustained.

236. BY HUSBAND ALONE, FOR LOSS OF SERVICES AND EXPENSES INCURRED.

The said A B, plaintiff, complains of the said C D, defendant, for that the said defendant, on the day of , A. D. 18 , unlawfully and with force assaulted E, then and still being the wife of the said plaintiff, and beat, bruised, wounded, and ill-treated her, the said E, so then being the wife of the said plaintiff, by

means whereof the said E became and was sick and lame, and so remained for the space of weeks, (or, days,) whereby the said plaintiff, during all that time, lost the services of the said E in his domestic affairs, and was compelled to expend and pay out $, in and about endeavoring to heal and cure the said E of the sickness and lameness aforesaid, and other wrongs did; to the damage of the said plaintiff $.

Wherefore the said plaintiff prays judgment against the said defendant for the said sum of $, his damages so as aforesaid sustained.

The above form can easily be converted into one for an assault upon a servant, whereby the master lost his services, and paid expenses in curing him. It is only necessary to insert the name of the servant, and aver him a servant instead of a wife.

237. FOR FALSE IMPRISONMENT.

The said A B, plaintiff, complains of the said C D, defendant, for that the said defendant, on the day of , A. D. 18 , unlawfully and with force assaulted the said plaintiff, and beat, bruised, wounded, and ill-treated him, and then and there imprisoned him, and kept and detained him in prison there, without any reasonable or probable cause whatsoever, for the space of next following, and other wrongs then and there did to the said plaintiff; to the damage of the said plaintiff $.

Wherefore the said plaintiff prays judgment against the said defendant for the said sum of $, his damages so as aforesaid sustained.

238. FOR CHASING CATTLE.

The said A B, plaintiff, complains of the said C D, defendant, for that the said defendant, on the day of , A. D. 18 , and on divers other days between that day and the commencement of this action, unlawfully and with force, drove, chased, and hurried the sheep, ewes, and lambs of the said plaintiff, of the value of $, to wit, (ten sheep, ten ewes, etc.,) then depasturing in a certain field, (or, parcel of land,) situate in , and then and there chased and drove the said sheep, ewes, and lambs from off said field, (or, parcel of land,) to some place to the said plaintiff unknown, (or, to , *if the place is known,*) whereby the said plaintiff was put to great expense, to wit, the sum of $, in endeavoring to find said sheep, ewes, and lambs, and sheep, ewes, and lambs, of the value of $, did then and

there die, and others thereof were injured and lost to the said plaintiff; to his damage $.

Wherefore the said plaintiff prays judgment against the said defendant for the said sum of $, his damages so as aforesaid sustained.

Other cattle may be embraced in this count as well as sheep. It is applicable to cattle, horses, etc.

239. SAME—A BRIEFER COUNT.

The said A B, plaintiff, complains of the said C D, defendant, for that the said defendant did, on the day of , A. D. 18 , chase and drive about, (*here state the cattle or animals driven,*) of the said plaintiff, of the value of $, whereby the said became and were greatly damaged and injured, and ten of said were killed, and were bruised, wounded, and lamed, etc. (*as the fact may be, as to special injury; conclude as in the last.*)

240. FOR TAKING AND CARRYING AWAY GOODS.

The said A B, plaintiff, complains of the said C D, defendant, for that the said defendant, on the day of , A. D. 18 , at , in the county of , seized, took, and drove, (or, if inanimate things, *carried,*) away cows, calves, horses, (or, the following goods and chattels, to wit, one wagon, etc., *describing the property as it is,*) of the said plaintiff, of the value of $, then and there being found, and converted and disposed of the same to his own use; to the damage of the said plaintiff $.

Wherefore the said plaintiff prays judgment against the said defendant for the said sum of $, his damages so as aforesaid sustained.

241. FOR SHOOTING DOG, OR OTHER ANIMAL.

The said A B, plaintiff, complains of the said C D, defendant, for that the said defendant did, on the day of , A. D. 18 , unlawfully and with force, shoot off and discharge a certain gun, then loaded with gunpowder and ball, at and against a certain dog of the said plaintiff, of the value of $, and thereby and therewith then so hurt and wounded said dog, that, by reason thereof, the said dog, afterward and before the commencement of this action, died; (*if dog did not die, state the wounding, etc.,*) to the damage of the said plaintiff $.

Wherefore the said plaintiff prays judgment against the said defendant for the said sum of $, his damages so as aforesaid sustained.

242. FOR LETTING BOAT ADRIFT.

The said A B, plaintiff, complains of the said C D, defendant, for that the said defendant seized and took the flat-boat, (ferry-boat, barge, skiff, etc.,) of the said plaintiff, of the value of $, then floating and being in the Ohio river, at , and then and there moored and fastened with a certain rope of the said plaintiff, and then and there unmoored and unfastened the said boat from the said place, and thereby set said boat adrift on said river, whereby said boat was damaged and broken to pieces, and the said plaintiff was wholly deprived of the use and benefit thereof for the space of weeks, and put to the expense of $, in getting said boat repaired and brought back to the said place where it was as aforesaid moored; to the damage of the said plaintiff $.

Wherefore the said plaintiff prays judgment against the said defendant for the said sum of $, his damages so as aforesaid sustained.

243. FOR TRESPASS TO DWELLING-HOUSES.

The said A B, plaintiff, complains of the said C D, defendant, for that the said defendant, on the day of , A. D. 18 , and on divers other days between that day and the commencement of this action, unlawfully and with force, broke and entered a certain dwelling-house, (shop, store, barn, office, smoke-house, etc.,) of the said plaintiff, situate and being in , in the county of , and then and there made a great noise and disturbance therein, and continued therein making such disturbance for the space of then next following, and then and there forced and broke open and damaged the doors, windows, and cupboards of the said plaintiff, of and belonging to the said dwelling-house, and broke and spoiled the locks, hinges, and bolts, wherewith said doors, etc., were hung and fastened; and also, during said time, unlawfully, and with force, seized and took the following goods and chattels, to wit, (*here describe them,*) of the said plaintiff, then being found in said dwelling-house, of the value of $, and carried the same away, and converted and disposed of the same to his own use, whereby the said plaintiff and his family, during all of said time, were greatly disturbed, and the said plaintiff prevented from carrying on his lawful affairs and business; to the damage of the said plaintiff $.

Wherefore the said plaintiff prays judgment against the said defendant for the said sum of $, his damages so as aforesaid sustained.

244. COMMON COUNT FOR EXPULSION.

The said A B, plaintiff, complains of the said C D, defendant, for that the said defendant, on the day of , A. D. 18 , unlawfully and with force, broke and entered the dwelling-house, (shop, church, store, etc.,) of the said plaintiff, situate in , in the county of , and then and there ejected the said plaintiff and his family from the possession, use, and enjoyment of the same, and kept them so ejected for the space of weeks, whereby the said plaintiff, during all that time, was deprived of the use and benefit of said dwelling-house; to his damage $.

Wherefore the said plaintiff prays judgment against the said defendant for the said sum of $, his damages so as aforesaid sustained.

245. FOR TRESPASS TO LAND.

The said A B, plaintiff, complains of the said C D, defendant, for that the said defendant, on the day of , A. D. 18 , and on divers other days and times between that day and the commencement of this action, unlawfully and with force, broke and entered the close of the said plaintiff, situate in , in the county of , and known and described as follows: (*here describe the premises, if it can be conveniently done,*) and then and there broke open and damaged gates, panels of fence, then being on said premises, and with his feet, in walking, trod down the grass and corn of the said plaintiff, of the value of $, there then growing, and with cattle, horses, mares, cows, oxen, etc., wagons, etc., (*as the case may be,*) trod down, eat up, and depastured the grass, wheat, corn, oats, turnips, etc., then thereon growing, of the value of $, and converted and disposed of the same to his own use; and then and there cut down ten oak trees, ten sugar trees, etc., and carried the same away and converted the same to his own use, (*or state any other use made of the land by defendant, or any other injury done to the same, as the case may be; these are mere examples to be used as applicable;*) and thereby, and during all that time, greatly incumbered said close, and prevented the said plaintiff during all said time from having the use, benefit, and enjoyment thereof, in so ample a manner as he otherwise might and would have had; (*where there has been an expulsion, it should be stated, as that he* entered and ejected the said plaintiff therefrom, and kept him out of the possession thereof for the space of weeks; *so, too, if any property was removed and converted by defendant, it should be stated, otherwise no recovery can be had for that;*) and other

wrongs then and there did; to the damage of the said plaintiff $.

Wherefore the said plaintiff prays judgment against the said defendant for the said sum of $, his damages so as aforesaid sustained.

246. FOR DIGGING IN A COAL MINE.

The said A B, plaintiff, complains of the said C D, defendant, for that the said defendant, on the day of , A. D. 18 , and on divers other days and times between that day and the commencement of this action, broke and entered into the close of the said plaintiff, situate in , in the county of , and described as follows: (*here describe them,*) and then entered into a coal mine or vein of coal then being in said close, and dug out of the same bushels of coal of the said plaintiff, of the value of $, and took and carried the same away, and converted the same to his own use; to the damage of the said plaintiff $.

Wherefore the said plaintiff prays judgment against the said defendant for the said sum of $, his damages so as aforesaid sustained.

247. FOR TAKING IRON ORE, ETC.

(*Follow the last to the close of the description of the premises, then proceed as follows:*) and then and there dug up tons of iron ore, (or, perches of rock, stone, clay, etc.,) of the said plaintiff, of the value of $, and took and carried the same away, and converted the same to his own use; to the damage of the said plaintiff $.

Wherefore the said plaintiff prays judgment against the said defendant for the said sum of $, his damages so as aforesaid sustained.

248. FOR MESNE PROFITS.

The said A B, plaintiff, complains of the said C D, defendant, for that the said defendant, on the day of , A. D. 18 , (*the time when he first entered,*) unlawfully, and with force, broke and entered the close of the said plaintiff, situate in , in said county of , known and described as follows, to wit, town (or, city) lot, in the town (or, city) of , (or, the northwest quarter, or, the northeast quarter of Section No. , Town No. , of Range No. ,) and ejected the said plaintiff from the possession thereof, and kept and continued him so expelled, from the said day of , A. D. 18 , up to the commencement of this action, and during all that time took and received to the use of the

said defendant all the issues and profits of said premises, of the yearly value of $, whereby the said plaintiff lost all profit and benefit from the use of said premises during all of said time; to the damage of the said plaintiff $.

Wherefore the said plaintiff prays judgment against the said defendant for the said sum of $, his damages so as aforesaid sustained.

This form will still answer where the entry was made not over four years prior to the commencement of the suit. If entry was made over that time before suit brought, this action will be barred by the statute of limitations.

Under the code, this count must be now included in the petition to recover the possession of the real estate, and if not so embraced, it would seem that the plaintiff could not bring a second action to recover the mesne profits. The word *may*, in such a case, must be construed to mean *shall*. If so, the rents must be demanded in the same action in which the possession is sought to be recovered. The plaintiff ought not to be permitted to bring two actions, when a single one will answer all the purpose. And yet there will be some confusion in mixing up a mere question of title with the rents and profits thereof. It has been done in trespass, and may be done in such a case. As the code is, it would seem that the whole claim must be made at once.

249. FOR REPLEVIN.

The said A B, plaintiff, complains of the said C D, defendant, for that the said plaintiff is the owner and entitled to the immediate possession of the following goods and chattels: (*here describe them as distinctly as possible*,) of the value of $, and that the said defendant unlawfully detains the said goods and chattels from the possession of the said plaintiff, and has detained the same as aforesaid for the space of ; to his damage $.

Wherefore the said plaintiff prays judgment against the said defendant, that he, the said defendant, do return to the said plaintiff the said goods and chattels, so unlawfully detained, and for the said sum of $, his damages so as aforesaid sustained, by reason of said unlawful detention.

Where the ownership is special, it had best be stated, as the jury must pass upon that issue.

250. AGAINST A JUSTICE OF THE PEACE FOR NEGLECT IN ISSUING.

The said A B, plaintiff, complains of the said C D, defendant, for that the said plaintiff, on the day of , A. D. 18 , at township, in said county of , did file with the said C D, he, the said C D, then being a justice of the peace for the said township of , his bill of particulars of a certain action which he, the said plaintiff, wished to bring against one , the said then being a constable in said township, to recover from the said the sum of $, damages, which he, the said plaintiff, had sustained by reason of a false return made by the said , on a certain summons before that time issued by the said defendant, as such justice, against the said plaintiff, and in favor of one , and did then and there request the said defendant, as such justice, to issue process, in due form of law, against the said , and in favor of the said plaintiff, as he, the said defendant, was by law bound to do; yet the said defendant, not regarding his duty in that behalf, did not, nor would issue process, but so to do wholly refused; to the injury of the said plaintiff, and to his damage $.

Wherefore the said plaintiff prays judgment against the said defendant for the said sum of $, his damages so as aforesaid sustained.

The justice is liable for such an act; so held in Powell *v.* Jones, 12 Ohio, 35.

251. FOR NEGLIGENCE OF BOARDING-HOUSE KEEPER, WHEREBY GOODS WERE LOST.

The said A B, plaintiff, complains of the said C D, defendant, for that the said plaintiff, at the request of the said defendant, became a guest in a boarding-house kept by the said defendant, and brought with her, the said plaintiff, into the same, the following articles, to wit, (*here state the articles,*) and the said plaintiff so became a guest, on the terms that the said defendant was to provide rooms, bedding, meat, drink, servants' attendance, and other necessaries, and would take due and reasonable care of the said goods of the said plaintiff, whilst they were in the house of the said defendant, for hire and reward to the said defendant in that behalf; and the said plaintiff saith that the said defendant did not take due and reasonable care of the said goods and chattels whilst so remaining in his said boarding-house; but on the con-

trary, the said goods and chattels, through the neglect and carelessness of the said defendant and his servants, became and were wholly lost to the said plaintiff; to the damage of the said plaintiff $.

Wherefore the said plaintiff prays judgment against the said defendant for the said sum of $, her damages so as aforesaid sustained.

This is copied from the declaration in the case of Dansey *v.* Richardson, 25 Eng. L. & Eq. 76. The court were divided in opinion as to the extent of care required in a boarding-house keeper. I think there may be negligence in a servant in leaving an outer door of a boarding-house open, whereby the goods of a guest are stolen, which might render the master liable. I think there is a duty on his part analogous to that incumbent on every prudent householder, to keep the outer door of the house shut at times when there is danger that thieves may enter and steal. If he employ servants to do this duty, and they neglect it, whereby a loss occurs, he is responsible. Per Campbell, C. J., Ibid. He thinks the keeper bound to have honest and faithful servants.

252. PETITION BY WIFE *v.* ONE SELLING INTOXICATING LIQUOR TO HER HUSBAND.

The said A B, plaintiff, complains of the said C D and E F, defendants, for that the said plaintiff, on the day of , A. D. 18 , was the wife of one G H, and that the said G H was then a person in the habit of getting intoxicated, of which the said defendants then had notice; yet the said defendants did, on the said day of , A. D. 18 , sell and deliver to the said G H one gallon (or, quart, or, pint, *as the case may be*,) of intoxicating liquor, whereby the said G H did afterward, to wit, on the said day of , A. D. 18 , (or, on the day of , A. D. 18 , *where the intoxication takes place on a day subsequent*,) became, and was intoxicated, and whereby, as the said plaintiff avers, the said defendants caused the intoxication of the said G H; and the said plaintiff further avers that the said G H, while so intoxicated, was then and for a long time thereafter, to wit, for the space of days, incapable of attending to his usual business and work, and the said plaintiff during all that time was compelled to attend upon and nurse the said G H, and provide the said G H with necessary food by the labor and industry of the said plaintiff; and the said G H, while so intoxicated, assaulted the person of the said plaintiff,

and put the said plaintiff in great fear and danger, and compelled her, the said plaintiff, to abandon her house and home in the night season, and seek safety and protection elsewhere, in the house and family of a neighbor; by reason of which the said plaintiff avers that she has sustained damages to the amount of five thousand dollars.

Wherefore the said plaintiff prays judgment against the said defendants for the said sum of five thousand dollars, her damages aforesaid, in form aforesaid sustained.

A B,

By , her Attorney.

This petition is prepared from one filed in the case of Phillips *v.* Richards & Sherer, tried in the Court of Common Pleas, in Washing county, October term, 1855. This is the first action of the kind in Ohio, which has come under our notice. The statute clearly requires all the averments contained in this petition: *First.* That the plaintiff is the wife of the person intoxicated. *Secondly.* That he was in the habit of getting intoxicated. *Thirdly.* That the defendant had notice or information of this fact. *Fourthly.* That the defendant sold intoxicating liquors to the husband in one of the ways declared illegal in the statute. *Fifthly.* That the party became intoxicated with said liquor; and, *Sixthly.* That the plaintiff was injured by the husband's being so intoxicated, in her person and means of support. These seem to be all the material facts which constitute a right of action. In setting out the sale and delivery of the liquor, it should be done in such terms as would constitute a sufficient description of the offense in an information. It clearly would not be enough to aver that the defendant sold the liquor contrary to the provisions of the act, reciting the title; the sale must be so described as in terms to show that the act was one of the acts prohibited in the statute. The particular act of selling must be set forth specifically, so that the party can have notice of the precise act of selling to which he is to answer.

It would seem, also, that the special damages must be set forth, so that the defendant may be prepared to meet them. The only damage which a wife can suffer is either by injury to her person, by threats, an assault, or a battery, or in her means of support, by having her husband disabled from performing his usual labor, and hence by being herself compelled to perform additional labor, in nursing him and providing for his support. In the case of a wife,

these must constitute the special damages of which she may or can complain. A child, also, would probably be confined to some such special damages.

Where the plaintiff is not thus connected with the party, he may set forth any special damage he may sustain by reason of the intoxicated person. As for instance: he may recover the value of a horse ruined by a person in a state of intoxication, or the value of any other property destroyed by such a person; and also damages for a personal injury inflicted upon him by an intoxicated person. But the special damage must, in all cases, be stated in the petition, as happening or being caused by a person intoxicated with liquor, bought of the defendant.

We believe it will be found that the above principles must regulate the form of a petition in such an action. They are in conformity to the rules which have heretofore been held applicable to special actions for the recovery of damages for a special injury.

The answer must, of course, correspond to the nature of the action. The defendant may plead a general denial, which will put the plaintiff upon proof of all the material allegations contained in the petition; or he may deny specially any one of these material averments.

These special denials may be: *First.* That the said plaintiff is not the wife of the person charged to have been intoxicated. *Secondly.* That the husband was not in the habit of getting intoxicated. *Thirdly.* That the said defendant had no notice that the said person was so in the habit of getting intoxicated. *Fourthly.* That the defendant did not sell the liquor to the husband in manner and form as the plaintiff hath alleged. These are all the material facts, upon the truth of which the right of action depends, and on a failure to prove any one of which the plaintiff's right of action must fail.

No issue can be taken upon the averments of special damages, since these are not issuable facts; being inserted merely for the purpose of informing the party for what special damages the plaintiff complains. This would at least be the case where a wife, or child, or parent was plaintiff, because nominal damages would, in such a case, follow a finding of the material facts as above stated. In the case, however, of a stranger, where his right of action depends wholly upon the existence of a special damage, then the defendant might deny the special injury complained of; because, if this injury was not sustained by reason of the acts of the intoxicated person, the defendant would not, of course, be

liable at all. Hence the defendant may deny the averment of special damage, since this is to deny any right of action in the plaintiff.

253. AN EMPLOYER *v.* ONE SELLING INTOXICATING LIQUOR TO HIS SERVANT, WHEREBY SPECIAL DAMAGE HAS BEEN SUSTAINED.

The said A B, plaintiff, complains of the said, C D, defendant, for that one E F was, on the day of A. D. 18 , in the employment of the said plaintiff, in driving the horses and carriage of the said plaintiff; and that the said defendant did then, while the said E F was so in the employment of the said plaintiff as aforesaid, sell to the said E F, at the shop of the said defendant, in the town of , in the county of , certain intoxicating liquor, to wit, whisky (or, brandy, *as the case may be*,) then and there to be drank by the said E F, and that the said E F did then and there drink the said intoxicating liquor; and thereby the said defendant did then and there cause the intoxication of the said E F; and the said plaintiff further avers that the said E F, while so intoxicated, and while so in the employment of the said plaintiff, did, on the said day of , A. D. 18 , by reason of said intoxication, so drive the said horses and carriage of the said plaintiff, that the said carriage was overturned, and the same was greatly broken, and the said horses greatly injured; to the damage of the said plaintiff, as he avers, two hundred dollars.

Wherefore the said plaintiff prays judgment against the said defendant for the said sum of two hundred dollars, his damages aforesaid, in form aforesaid, sustained.

254. ANOTHER PERSON *v.* ONE SELLING INTOXICATING LIQUOR TO A PERSON WHO ASSAULTS THE PLAINTIFF.

The said A B, plaintiff, complains of the said C D, defendant, for that the said defendant did, on the day of , A. D. 18 , at his, the said defendant's shop, situate in the town of , in the county of , sell and deliver to one E F one pint of intoxicating liquor, called whisky, to be then and there drank by the said E F, and which intoxicating liquor the said E F did then and there drink, and by reason thereof the said defendant did then and there cause the intoxication of the said E F; and the said plaintiff further avers that the said E F, while so intoxicated, and by reason thereof, did then and there unlawfully assault the said plaintiff, and him, the said plaintiff, did unlawfully beat, strike,

and wound; to the damage of the said plaintiff, as he avers, one thousand dollars.

Wherefore the said plaintiff prays judgment against the said defendant for the said sum of one thousand dollars, his damages aforesaid, in form aforesaid, sustained.

This last form may be adapted to all the cases that can occur. The averment of the special damage must, of course, correspond with the fact. If property has been injured, or destroyed, the averment must, of course, describe the property so destroyed. In that case the plaintiff must aver that the said E F, while so intoxicated, and by reason thereof, unlawfully shot at and wounded the cow (or, horse, etc.,) of the plaintiff, or destroyed any other property, as the case may be.

This form describes a sale of liquor under the first section of the act. Of course the sale may be one under either of the other sections; when it is, it must be described as it would be in an information. The kind of liquor must be stated, in describing a sale under section one, as the sale of domestic wine, and ale, and beer are not prohibited under that section. Under sections two and three, it will be enough simply to aver a sale of intoxicating liquors, as it is declared to be unlawful to sell any kind of intoxicating liquors to minors or persons in the habit of getting intoxicated.

255. WIFE *v.* ONE SELLING INTOXICATING LIQUOR TO HUSBAND.

The said A B, plaintiff, complains of the said C D, defendant, for that the said A B is the wife of one E F, and was such wife before and at the happening of the grievances, hereinafter set forth, and the said E F was a person in the habit of getting intoxicated; and that said plaintiff had a family of children, depending upon the labor of said plaintiff and E F, for her and their maintenance, nurture, and support; and that the said defendant, on the day of , A. D. 18 , did sell and deliver, (or, give, *as the case may be*,) to the said E F, certain intoxicating liquor, to wit, (*here state quantity*, one gallon, ten glasses, etc.,) whereby the said E F became intoxicated and incapable of doing his ordinary work, and did not, during days, do and perform any labor or work whatever; and that said plaintiff was thereby injured in her means of support, in this, that her said husband usually earned when at work dollars for each and every day's work performed by him, to be used and devoted to the support of the plaintiff and her said

children, whereas by said intoxication the said E F did no work and earned nothing during his state of intoxication, and the plaintiff was thereby deprived of the said sums of money so lost, for her support and that of her children, and suffered thereby for the want of necessary food and clothing, which she otherwise might have enjoyed, and was compelled to labor herself harder than her health would justify to sustain herself and family in necessary food and clothing, and was also compelled to nurse and attend upon the said E F, while so intoxicated; to the damage of the plaintiff of $.

Wherefore she prays judgment against said C D for said sum of $, her damages so sustained.

E A, Attorney for Plaintiff.

This is framed under the act of April 18, 1870. 67 Ohio L. 101. Under this act several things are necessary to a recovery: 1. The sale of the liquor; 2. That the party became intoxicated from drinking it; 3. The injury to person, property, or means of support. All of these facts are to be proved, as I understand the Supreme Court to have ruled in a case not yet reported. Such, too, is the plain reading of the act. If, therefore, one wishes to prove a series of sales and states of intoxication, the petition must contain separate counts on each sale, because the intoxication must arise from a sale, and a sale is a single and specific act. The petition, too, must state the particular injury complained of; it is not enough to aver that the party was injured in his property, or in his person, or in her means of support; the facts must be set forth how she was affected in her means of support. The defendant is not a party to the injury and can not be supposed to be acquainted with it; the plaintiff knows the way he or she has been injured, and therefore, by all the rules of pleading, is not allowed to plead generally, but is required to show how he or she is injured. Suppose a case, where the husband is a man of wealth, and liquor is sold him, and he gets drunk, can the wife recover in such a case, when her means of support are not diminished?

When the fact of a sale and intoxication are proved, and that the injury set forth has been sustained, then the plaintiff may show the conduct of defendant in selling at other times, the fact that he knew the party was addicted to habits of intoxication, had been requested not to sell, and any other conduct on the part of the defendant, showing his disregard of social duty and the happiness of the drunken man's family. If, when intoxicated, he should beat

his wife, or child, or other person, the seller would be responsible for that injury. The prior forms will answer under this act, though the averment of the sale being illegal, may be omitted. And yet it is a grave question, whether a party can be liable to an action, for a sale in conformity to law. This section is part of a law regulating the sales of intoxicating liquors, and declaring what sales are legal and what not. It would seem that the true construction of the act is, or should be, that the sales for which one is civilly liable, should be such sales as are prohibited by law. It is a strange doctrine, that one is liable for an act which the law says is not illegal.

256. AGAINST ONE FOR OBSTRUCTING FLOW OF WATER FROM A MINE.

The said A B, plaintiff, complains of said C D, defendant, for that before the committing of the grievances hereinafter mentioned, the plaintiff, being possessed of a certain colliery, (or, coal mine,) known and called , situate in , of , in the county of , did, on the day of , A. D. 18 , at their own cost and by the license and with the consent of the owner and occupier of certain land near to the said colliery, make a water-course in and over said land for carrying away the water by them from time to time pumped for the said colliery, and from thence until and at the time of the committing of the grievances hereinafter mentioned, during all which period they were possessed of the said colliery, the plaintiff by the license and with the consent of the said owner and occupier of the said land enjoyed the advantage of having the water so by them pumped as aforesaid, flow away from the said colliery along said water-course; that the license and consent to enjoy said advantage, and the plaintiff's possession of the said colliery, continued till the commencement of this action, and still do continue, and that the said license, consent, and advantage were of great value to the plaintiff; yet the said defendant, well knowing the premises, and contriving and intending to injure the plaintiff, did, on the day of , A. D. 18 , wrongfully and willingly obstruct the said water-course by filling the same up with earth, logs, and other articles, (or, *whatever the obstruction was*,) and thereby prevented the water so pumped from said colliery from flowing along the channel so dug by plaintiff as aforesaid, and the water was thereby thrown back onto the said colliery, by means whereof the plaintiff hath sustained great damage and will sustain further damage in getting rid of the water from his said colliery,

and in the facilities of working the same, and other wrongs; to the damage of plaintiff $.

Wherefore plaintiff demands judgment against said defendant for the said sum of $, his damages so as aforesaid sustained.

F G, Attorney for Plaintiff.

This form may be found substantially in the report of the case of Roberts *v.* Rose, L. R., 1 Exch. 82. These forms may become useful, as the mining of coal in this region of the West is become a colossal industry.

257. FOR POLLUTING A WATER-COURSE.

The said A B, plaintiff, complains of said C D, defendant, for that the plaintiff, before and at the time of committing the grievances hereinafter mentioned, was possessed of a farm at , in the county of , through which flowed a stream of water, and that the plaintiff was entitled to have had, and ought still to have, the use and benefit of the water of said stream for his cattle and other purposes; yet the said defendant well knowing the premises, but contriving to injure the plaintiff, did, on the day of , A. D. 18 , and on divers other days, wrongfully and unlawfully pollute and disturb the water of said stream so that it became foul and impregnated with noxious substances; so that the cattle of the plaintiff were unable to drink the same, and the plaintiff has been compelled to drive his cattle to a distance for water, and has lost the use and benefit of the water of said stream, whereby the value of his farm was greatly depreciated; to his damage $.

Wherefore he prays judgment against said defendant for said sum of $. his damages so as aforesaid sustained.

W T, Attorney for Plaintiff.

The above is found in the case of Moore *v.* Webb, 1 C. B., N. S. 673; S. C., 87 Eng. C. L. 673. In this case, it was a tannery, situated on the stream above the plaintiff. A defense was interposed of a twenty years' user; but it appeared that the tannery had been largely enlarged within that time, so that the presumption had not arisen as to this larger quantity of noxious matter thrown into the stream. *Vide* Bowen *v.* Jenkins, 6 Ad. & Ellis, 911; S. C., 33 Eng. C. L. 911; Allan *v.* Gomme, 11 Ad. & E. 759; S. C., 39 Eng. C. L. 759; Wright *v.* Williams, 1 M. & W. 77; Manning *v.* Wasdale, 5 Ad. & E. 758; S. C., 31 Eng. C. L. 758; Roachdale Canal Co. *v.* Radcliff, 18 Q. B. 287; S. C., 86 Eng. C. L. 287; Bealy

v. Shaw, 6 East, 208. A party who fouls a stream to the damage of a lower proprietor of the stream, is liable for the damage.

258. FOR NUISANCE IN HIGHWAY.

The said A B, plaintiff, complains of said C D, defendant, for that before and at the time of the committing of the wrongs and grievances hereinafter mentioned, there was and thence hitherto hath been a common and public highway in the township of , in said county of , for all persons to pass and repass on foot and by and with horses and carriages, at all times, at their free will and pleasure; yet the said defendant, well knowing the premises, heretofore, to wit, on the day of , A. D. 18 , wrongfully, illegally, and unjustly cut, dug, and excavated a deep ditch or trench across the said highway, and partially filled and covered in the same with mud, dirt, and other soft and loose materials, and then thereby rendered that portion of said highway across, over, and along the said ditch or trench so cut, dug, and excavated as aforesaid, soft, miry, dangerous, and unsafe to persons using and frequenting the said highway on horseback, in wagons, or otherwise; and the plaintiff saith that by means of said several premises, afterward and whilst the said highway remained and was in the said state and condition last aforesaid, and before the commencement of this action, to wit, on the day of , A. D. 18 , a horse of the said plaintiff of great value, to wit, of the value of $, which horse the said plaintiff was then lawfully riding on and along the said highway, was thrown by stepping in and upon the said portion of the highway which was so rendered soft, miry, and dangerous, and unsafe as aforesaid, and thereby, without the fault of the plaintiff, the knees of the said horse in passing over said place or ditch, were broken, and said horse was and is otherwise greatly injured, and rendered of little or no use or value to the plaintiff, who was also then subjected to and incurred great expense in doctoring and endeavoring to save said horse; to the damage of the plaintiff $.

Wherefore said plaintiff prays judgment against said defendant for said sum of $, his damages so as aforesaid sustained.

E H, Attorney for Plaintiff.

This form is found in the report of the case of Sadler *v.* Henlock, 4 Ellis & Bl. 570; S. C., 82 Eng. C. L. 570. The defendant occupied land by side of the highway named in declaration. The land was drained by a drain, which passed under the highway.

Having become obstructed, he directed a man called Pearson, to cleanse out the drain; P was no otherwise in the employ of the defendant, being a common laborer, who made the drain. He executed the work with his own hands, and defendant paid him five shillings for the job. Defendant did not interfere with the work, nor did he see how it was done; he took up part of highway, under which the drain ran. After completing the work, he replaced the soil of highway, but imperfectly and with insufficient materials; and in consequence, the road gave way and the horse was injured. The defendant contended he was not liable, but the court held that P was acting in the matter as servant of the defendant, and, therefore, he was liable for the injury. Coleridge, J.: "The defendant was not called on by public authority to do the work; nor was there any reason why, if it could not be done properly, it should be done at all. If the work had been done by his own hands, he would have been responsible. So he would if it had been done by his servant or by a common laborer whom he had employed. On what ground? Because the party doing the act would have been employed by him. Instead of this, he employs a person who seems to have been usually employed in such work. Such person is as much his servant for this purpose as a domestic servant." *Vide* Milligan *v.* Wedge, 12 A. & E. 737; S. C., 40 Eng. C. L.; Peachy *v.* Rowland, 13 C. B. 182; S. C., 76 Eng. C. L. 182; Overton *v.* Freeman, 11 C. B. 867; S. C., 73 Eng. C. L. 867; Knight *v.* Fox, 5 Exch. 721; Reedie *v.* L. & N. West. R. R. Co., 4 Exch. 244; Randleson *v.* Murray, 8 A. & E. 109; S. C., 35 Eng. C. L.; Ellis *v.* Gas Co., 2 E. & B. 767; S. C., 75 Eng. C. L. 767.

259. AGAINST BAIL TO SHERIFF FOR NOT JUSTIFYING, WHEREBY HE HAS BEEN DAMNIFIED.

The said A B, plaintiff, complains of the said C D and E F, for that the said plaintiff, before and at the time of the doing of the acts hereinafter mentioned, was sheriff of said county of , and there came to his hands as such sheriff an order of arrest granted in a certain case pending in the Court of Common Pleas, within and for said county, wherein one was plaintiff and one was defendant, commanding said plaintiff to arrest the body of the said , and to hold him to bail in the sum of $, and that the said plaintiff did, by virtue and authority of said order of arrest, on the day of , A. D. 18 , arrest the said , within said county of , and then had him, the said , duly in custody, and that the said C D and E F, in

order to relieve the said from said arrest, and from the custody of said plaintiff, entered into an undertaking to the said , in the sum of $, in the presence of the said plaintiff, as such sheriff, to the effect that, if judgment shall be rendered in said action against the said , he, said , will render himself amenable to the process of the court thereon; and said plaintiff further saith that afterward, to wit, on the day of , A. D. 18 , the said (*plaintiff in the order*,) did notify said plaintiff in writing that he excepted to the sufficiency of said bail; and thereupon the said plaintiff notified said defendants, and said plaintiff named in said order, to appear on the day of , A. D. 18 , at the clerk's office of said county, there before the clerk of said court to justify the bail in said action, and on said day the said defendants were by said clerk of said court adjudged to be insufficient bail in said action, and the said and the said defendants failed to give additional bail, whereby said plaintiff was by law left as bail for the said ; and that afterward, to wit, at the term of said court, the said recovered in said action a judgment against the said for the sum of $, and $, costs of suit; and that the said caused an order of arrest to be issued on said judgment to enforce the payment of said debt and costs, and that the said did not render himself amenable to said last-named process, but absconded and left the country, whereby said plaintiff, as such bail under the statute, became liable to pay and was compelled to pay the said sum of $, together with the sum of $, as interest thereon, together with said sum of $, the costs in said case, and the sum of $, additional costs thereon, of all which said defendants had notice; to the damage of the said plaintiff in the sum of $.

Wherefore he prays judgment against said defendants for said sum of $, his damages so as aforesaid sustained.

S N, Attorney for Plaintiff.

The bail failing to justify, are liable to the sheriff for the damages he may sustain by reason of such insufficiency. This liability came under consideration in the case of Clapp *v.* Schutt, 44 N. Y. 104. The court say: "Complete provision is made in law for the emergency. The sheriff takes the bail in the first instance upon his own responsibility, and then, if they are objected to and fail to justify, he is held as bail; but the law allows him to sue the

bail for the damages, which he may sustain by reason of their failure to justify. In such suit the bail are not liable to the sheriff upon their undertaking, but because they gave it and have failed to justify, and have thus damnified the sheriff." If a new undertaking is given, on justification made, it takes the place of the former; and if no new undertaking is given, the law holds the sheriff, and his liability is taken in place of the undertaking. The bail or principal may deposit money in lieu of bail to the action. The Corn Warehouse Co. *v.* Graber, 45 N. Y. 394; Morrow *v.* The State, 6 Kan. 222.

260. AGAINST ONE ELECTED CONSTABLE FOR NOT ACCEPTING THE OFFICE.

The township of complains of the said C D, defendant, for that heretofore, to wit. at the regular township election. held on the first Monday of April, A. D. 18 , the said C D was duly elected to the office of constable for said township; and by the judges of said election was duly declared elected to said office; and that afterward, to wit. on the day of , A. D. 18 , the said C D was duly notified of his said election to the office of constable as aforesaid, according to the provisions of the statute; and that the said C D did then and has ever since refused to qualify himself according to law, for the said office of constable, and to serve in and execute the duties of said office within the time limited by law, and thereby became liable to the said plaintiff in the sum of two dollars for so refusing to serve in said office of constable; and that on the day of , A. D. 18 , E F, clerk of said township, duly authorized, demanded said sum of two dollars of said defendant; yet the said defendant refused to pay the said sum of two dollars or any part thereof.

Wherefore, plaintiff demands judgment against said defendant for said sum of two dollars.

G W F, Attorney for Plaintiff.

Vide Hartford *v.* Bennett, 10 Ohio St. 441. The answer set up was that at said election he was elected supervisor of a road district, and qualified for that office and served therein. This answer was held sufficient, as a citizen could not be held to serve in two offices at the same time.

261. AGAINST AGENT REPRESENTING HE HAS AUTHORITY WHEN HE KNOWS HE HAS NOT.

The said A B, plaintiff, complains of the said C D, defendant, for that before and at the time of committing the grievances hereinafter stated, a church was in the course of erection at , in said county of , of which church the Rev. was incumbent and minister, and active in causing and procuring said church to be built, and that the said defendant had been and was employed as architect to superintend the said works and building; and that said defendant so being such architect employed as aforesaid, did, on the day of , A. D. 18 , falsely and fraudulently represent and pretend that he, said defendant, was authorized by the said Rev. to order, and did order, certain stone of the plaintiffs for the building of the said church for and on account of, and to be charged to the said Rev. , and did then and there falsely and fraudulently write and send to the said plaintiffs a certain order for seven hundred feet of stone, to be sent to , and to be charged to the said Rev. ; and that the said plaintiffs, relying on said representation of the defendant, and believing that the said defendant had authority from the said Rev. to order the said stone for the building of said church for and on account of, and to be charged to said Rev. , forthwith upon the receipt of said order of the defendant, did send and deliver the seven hundred feet of stone so ordered as aforesaid, and the same was there used and worked up in building of said church; whereas, in truth and in fact, the said defendant was not, as he then very well knew, authorized by the said Rev. to order the said stone, or any stone, for or on account of, or to be charged to said Rev. , or to write and send said order to the plaintiff as aforesaid mentioned; but that he, said defendant, then very well knew that the representation aforesaid was false and not true; and the plaintiffs further aver that the said Rev. refused to pay for said stone and the same being wholly unpaid for, the said plaintiffs, confiding in the said representation of said defendant, sued the said Rev. in this court in an action for the price of said stone, amounting to the sum of $, which action the said Rev. defended and denied his liability thereon, and which action was afterward, to wit, at the term of this court, tried, and a verdict and judgment was then and there rendered in favor of said Rev. , and against these plaintiffs, upon the ground that said defendant had no authority from the said

Rev. to order or send for said stone to be charged to said Rev. ; whereupon and by reason of the premises, the said plaintiffs have not only lost the price of said stone, which had not yet been paid, but also expended and had become liable to pay divers large sums of money, amounting to the sum of $, in the unsuccessful prosecution of said action, and also had become liable, and were liable, and bound to pay to the said Rev. the further sum of $, for his costs in and about the said action by him duly expended and taxed in defending said action; and all to the damage of said plaintiffs $.

Wherefore said plaintiff prays judgment against said defendant for the said sum of $, his damages so as aforesaid sustained.

T R, Attorney for Plaintiff.

The above is the declaration in the case of Randells *v.* Trimen, 18 C. B. 786; S. C., 86 Eng. C. L. 786. In that case and the cases there referred to, the whole law on this subject is discussed and summed up. Jervis, C. J., said: "In the notes to Thompson *v.* Davenport, 9 B. & C. 78; S. C., 17 Eng. C. L. 78, in 2 Smith Leading Cases, 4 ed. 301, the learned editors state that in the luminous judgment delivered in Smout *v.* Ilbery, 10 M. & W. 1, the cases where agents have been held to be personally responsible, are divided into three classes: 1. Where the agent makes a fraudulent representation of his authority *with intent to deceive.* 2. Where he has no authority, and knows it, but nevertheless makes the contract as having such authority. 3. Where, not having in fact authority to make the contract as agent, he yet does so *under the bona fide belief that such authority is vested in him;* as in the case of an agent acting under a forged power of attorney, which he believes to be genuine and the like. As to the form of the action, the note goes on to say, in which agents within these three classes can be made liable, it has been seen that (according to recent decisions not yet perhaps universally assented to) they can not be sued upon the contracts, which they have entered into without authority, on behalf of their assumed principals, unless they can be shown to be themselves principals. It seems clear, however, that agents within the first and second classes would be liable in an action of deceit for false representation, although it is conceived that that form of action would not be applicable to the case of agents within the third class, the representation of authority being *bona fide.* See notes to Palsey *v.* Freeman, 3 Term, 51; but see per Erle, J., in Jenkins *v.* Hutchinson, 13 Q. B. 748; S. C., 66 Eng. C. L. 748.

An action, however, on an implied contract for the existence of the authority each professed to have, would appear to include all three classes. Lewis *v.* Nicholson, 18 Q. B. 503; S. C., 83 Eng. C. L. 503, is also a very strong case." Palhill *v.* Walter, 3 B. & Ad. 114.

The case of Smout *v.* Ilbery, 10 M. & W. 1, was a case, where the husband having gone to India, and died on the way, his wife continued to deal with plaintiff after as before the date of the death, and she was sued for goods sold and delivered. The court had decided in Blodes *v.* Free, 9 B. & C. 167; 4 Man. & Ry. 282, that in such a case, the executors of the husband were not liable. Alderson, B., says: "If, then, the true principle derivable from the cases is that there must be some wrong or omission of right on the part of the agent, in order to make him personally liable on a contract made in the name of the principal, it will follow that the agent is not responsible in such a case as the present. And to this conclusion we have come." In Cassidy *v.* McKenzie, 4 W. & S. 282, it was held that payment to an agent after death of principal, made in ignorance of that fact, was good. A majority of the Supreme Court of Ohio held that where an agent made a sale of land after the death of the principal, the heirs were bound by the contract. Ish *v.* Crane, 8 Ohio St. 520. This case has hardly any authority to stand on; and if an authortity at all, must be limited to the particular facts of that case. In New York, it has been held that an agent who makes a contract in the name of another without authority, is personally liable. Much *v.* Smith, 7 Wend. 315; Clark *v.* Foster, 8 Vt. 98; Sinclair *v.* Jackson, 8 Cowen, 543; Ballow *v.* Talbot, 16 Mass. 461; Loing *v.* Stewart, 1 Watts & S. 222; Edings *v.* Brown, 1 Richardson, (S. C.) 255; Bank of Hamburg *v.* Wray, 4 Strobhart, 87; Tefts *v.* York, 4 Cush. 371; Johnson *v.* Smith, 21 Conn. 627; Keenor *v.* Harrod, 2 Md. 63. One, who contracts professedly for another without authority, does not render himself liable upon the contract as a party to it; but the remedy against him is by a special action on the case. Ballow *v.* Talbot, 16 Mass. 461; Long *v.* Colburn, 11 Mass. 97. The remedy in these cases would seem to be settled by the remarks of Jervis, C. J., above: An action for fraud in the first two classes of cases, and an action on the implied promise that he had authority in the last case.

262. AGAINST AGENT ON CONTRACT FOR NOT HAVING AUTHORITY.

The said A B, plaintiff, complains of the said C D, defendant, for that the said defendant, on the day of , A. D. 18 , assumed to and promised the said plaintiff that he had authority, as

agent of one E F, to contract on his behalf and in his name, and so as to bind the said E F by such contract, and the plaintiff relying on said promise of said defendant, did then and there, through said defendant as such agent, agree with the said E F as follows, that is to say, (*here set out the contract, whatever it may have been, and in its letter or legal effect, and then proceed;*) but the said plaintiff saith that the said defendant was not in truth and in fact so authorized by the said E F to make said contract in his name, nor to bind him in any wise in such matter, and the said E F has wholly and absolutely refused to execute and carry out said contract according to the terms and stipulations thereof, whereby the plaintiff has utterly lost all profits he would have made on said contract, if the said E F had been bound thereby; to his damage $.

Wherefore he prays judgment against said C D for said sum of $, his damages so as aforesaid sustained.

E F, Attorney for Plaintiff.

This issue on this form will be a denial that he assumed and promised that he was the agent of the party named. The assumption is one which the law implies, and is therefore proved by the fact that he acted as agent, and had no authority so to do. The damages, as the recovery is for damages, and not for a specific sum with interest, will depend upon the nature of the contract; and the petition should vary its particular statement to correspond with the nature of the contract; and these averments must be so changed as to correspond with the conditions and terms of the contract, and no form can anticipate the variety of these conditions and the forms in which the grounds for damages are to be stated. The party can not be sued on the contract, because he has made none. If the agent, pretending to be agent of an undisclosed principal, has in fact no principal for whom he specifically assumes to contract—in such case the agent contracts for himself, because in that case, having no pretended principal, he is his own principal. But when he contracts for a known principal, there is no contract with himself; and hence he can not be sued on the contract.

263. FOR MALICIOUSLY PROSECUTING PLAINTIFF IN BANKRUPTCY.

The said A B, plaintiff, complains of the said C D, defendant, for that at the time of filing the petition hereinafter mentioned, the said plaintiff had not committed an act of bankruptcy, nor was,

at the time of filing said petition hereinafter mentioned, subject or liable to have any petition or proceedings in bankruptcy issued or prosecuted against him in bankruptcy under the law of Congress in relation to bankruptcy; yet the said defendant, well knowing the premises, but falsely and maliciously, and without reasonable or probable cause therefor, did, on the day of A. D. 18 , under the bankrupt law of the United States, file in the District Court of the United States, within and for the District of , a petition against said plaintiff for an adjudication of bankruptcy, and falsely and maliciously, and without reasonable or probable cause, prosecuted said petition and the proceedings thereon in said court; and such proceedings were had thereon that afterward, to wit, on the day of , A. D. 18 , said petition was heard, and the same was dismissed by said court at the costs of said defendant, and the said proceeding and prosecution wholly ended and terminated; and thereby and by reason thereof the said plaintiff was put to great trouble and expense in defending said petition and prosecution, and in employing counsel therefor, and to great losses in his business by reason thereof, and to the great injury of the credit of said plaintiff; to his great damage $.

Wherefore he prays judgment against said defendant for said sum of $, his damages so as aforesaid sustained.

THOS. H., Attorney for Plaintiff.

Vide Farley *v.* Danks, 4 Ellis & Bl. 493; S. C., 82 Eng. C. L. 493.

264. AGAINST CONSTABLE FOR NOT RETURNING EXECUTION ISSUED BY MISTAKE AGAINST TWO, WHEN JUDGMENT WAS RENDERED ONLY AGAINST ONE.

The said D P complains of the said A S and F D, defendants, for that heretofore, to wit, on the day of , A. D. 18 , the said defendants, by their certain writing obligatory of that date, acknowledged themselves to be held and firmly bound unto the State of Ohio in the sum of $, and which writing obligatory was and is subject to a condition thereunder written, and which condition is in the words following; that is to say, that the above-bound A S was duly elected to the office of constable of township, in said county of , Ohio, on the day of , A. D. 18 . Now, the condition of this obligation is such that, if the said A S shall faithfully receive, keep, and pay over to the proper person or authority all moneys which may come to his hands by virtue of his said office as constable, as aforesaid, and duly, honestly,

and faithfully perform all and singular his duties as such constable, according to law, during his continuance in office and until his successor is duly elected and qualified, then these presents shall become void, otherwise to be and remain in full virtue and force. And the plaintiff further saith that the said A S did thereupon take upon himself the duties of said office of constable of said township, in said county of , and assumed to act, and did act, as such constable at the time of committing the wrongs and grievances hereinafter stated. And the plaintiff further avers that, on the day of , A. D. 18 , one A S O recovered a judgment for $ debt, and $ costs of suit, against one J O, by the consideration of one R J, he, the said R J, then being a justice of the peace within and for said township of , in said county of , in a certain action then pending before said justice of the peace, wherein the said A S O was plaintiff, and the said J O and the said plaintiff were defendants; and that afterward, to wit, on the day of , A. D. 18 , the said justice of the peace issued an execution in said action against the said J O and the said plaintiff, D P, to satisfy said debt and costs, as upon a judgment against both said J O and said plaintiff, D P, when in truth said judgment was a judgment against said J O alone, and the justice then and there delivered said writ of execution so issued to the said A S as constable aforesaid; and that the said A S levied said execution so issued upon one gray mare of the said plaintiff, D P, of great value, to wit, of the value of $, to satisfy said execution, and advertised said gray mare for sale, and did sell the same at public auction, on the day of , A. D. 18 , to said A M D, for the sum of $; but the plaintiff avers that the said justice, having become satisfied of the error in the issue of said execution, did, before said day of sale, notify, verbally, said constable, A S, and in writing, on the day of sale and before said sale, to return said execution, as there was an error in the issue of the same, in including therein the name of the said plaintiff, D P, as a party defendant to said judgment and in said execution, in order that said error might be corrected, by omitting the name of said plaintiff, and that if he, said A S, proceeded in said sale, it would be at his own peril, and without authority in law; and that said constable, A S, at the time said judgment was rendered, well knew that said judgment was not by said justice rendered against said plaintiff, but against said J O alone; that the plaintiff also, before said day of sale, notified said A S, constable as aforesaid, of the error in the issue of said execution, and

that said A S was well aware of and knew all of the facts aforesaid; yet the said A S, as such constable, maliciously intending to injure said plaintiff, and make the amount of said execution by the sale of said gray mare so levied on, as said A S well knew that said J O was wholly insolvent, and nothing could be made of said J O, maliciously and willfully refused to return said execution, that the same might be corrected by omitting the name of the plaintiff, D P, and willfully and maliciously proceeded to sell, as aforesaid, said gray mare, the property of said plaintiff, levied on as aforesaid, whereby said A S, as such constable, was guilty of misconduct and malfeasance in his said office of constable, and did not honestly and faithfully perform his said duties of constable in this behalf, but did willfully, and maliciously, and wrongfully use said execution, so issued erroneously, in order and with the intention of maliciously and willfully injuring said plaintiff; to his damage $.

Wherefore said plaintiff demands judgment against said defendant for $, his damages so as aforesaid sustained.

S N, Attorney for Plaintiff.

This is not a count in trespass, but an action for maliciously using erroneous process, knowing it to be erroneous, to the injury of another. As against a constable or sheriff, he can justify an action of trespass by a process regular on its face; but after notice of the error in its issue, he is guilty of a malicious use of the process to the injury of another. In the case of Tomlinson & Sperry *v.* Warner, 9 Ohio, 103, the court held that an action for malicious prosecution would lie against one who sued out an attachment to the injury of the plaintiffs without probable cause. The case, in principle, holds that any malicious use of legal process to the injury of another will sustain an action. "The general rule is," says Wood, J., "that for every injury the law gives redress; and it would be a reproach to the administration of justice, if one, by perjury, could take from another the control of his property, under *form of law*, and the law afford no remedy. Nice technicalities are sometimes applied to get rid of a *hard case;* but when, under *form of law*, opportunity is sought to gratify malice to the injury of another, courts will not be able to *avoid*, but rather seek ground to sustain, an action." So in Closson *v.* Staples, 42 Vt. 209; S. C., 1 Am. 316, it was held that where a civil suit was commenced and prosecuted maliciously and without reasonable or probable cause, and is terminated in favor of the defendant, the plaintiff in such suit is liable to the defendant in an action for the damages sus-

tained by him in defense of that original action, in excess of taxable costs obtained by him; and to maintain an action to recover such damages, it is not material whether the malicious suit was commenced by process of attachment, or by summons only. The case of Whipple *v.* Fuller, 11 Conn. 581, is to the same effect. Williams, J., in the case of Cotterel *v.* Jones, 7 Eng. L. & Eq. 475, says: "If such an action be brought and prosecuted maliciously, and without reasonable and probable cause, I think there is no doubt an action will lie for it, provided legal damages have been sustained."

The English rule is that costs are a compensation for the damages sustained in bringing a groundless action, though maliciously brought. But in Ohio, there are no costs but for the costs in court; hence the English rule is not applicable here. The rule of the common law was in early time different in England. In 1 Comyn's Dig. 343 (Action on the Case A), the rule is stated that an action on the case lies for procuring an action to be brought against another maliciously. F. N. B. 116. So case lies for falsely and maliciously suing out a commmission of bankruptcy, which was superseded. 2 Wilson, 145. So in Co. Lit. 161 *a*, n. 4, it is said: "Where a civil suit is commenced falsely and maliciously, and for the mere purpose of vexation, it is actionable." Atwood *v.* Manger, Styles, 378; Waterer *v.* Freeman, Hob. 205, 266. So an action for a malicious prosecution will lie, when the creditor in an execution directed the sheriff to seize and sell plaintiff's goods to a much greater amount than the sum due. Sommer *v.* Wilt, 4 Serg. & Rawle, 19. So when defendant caused the plaintiff's goods to be attached in a civil suit without any probable cause. Shaver *v.* White, 6 Munf. 110; Ellis *v.* Tilman, 3 Call, 3; Young *v.* Gregory, 3 Call, 446. These authorities show that at common law any malicious use of legal process of any kind to the injury of another, will sustain an action; and it ought to, because no one should escape liability to the party injured by the malicious abuse of legal process. The statute in England giving costs, was supposed to provide a sufficient remedy for the prosecution of a groundless action. But there is a wide difference between good faith and bad faith in the use of legal process, and the courts are coming to that conclusion. In this country costs are no compensation for such an injury.

265. FOR MALICIOUS PROSECUTION IN CIVIL SUIT.

The said A B complains of the said C D, for that before the committing of the grievances hereinafter mentioned, to wit, on the day of , A. D. 18 , a certain promissory note in writing, dated the day of , A. D. 18 , and made by the plaintiff, for the payment to the order of of the sum of dollars and cents, at months from date, and indorsed in blank by the said (*the payee*) had been delivered so indorsed by the said (*payee*) to the said defendant , as a security for the payment of a certain other promissory note in writing, dated the day of , A. D. 18 , and made by one , for the payment to , or order, for the payment to him of dollars and cents, at months after the date thereof as aforesaid, and indorsed by , and then held by said defendant , and upon the terms that the said promissory note of $ should be returned by said defendant to the plaintiff, upon the said note for $, being fully paid and satisfied; and that there never was any other value or consideration than as aforesaid for the making or payment of said promissory note for $, by the plaintiff, or for the indorsement or payment of the same by (*the indorser,*) or for the defendant , holding the same; and that afterward and before the committing of the said grievances, to wit, on the day of , A. D. 18 , the said (*makers and indorsers of the second note,*) and the plaintiff respectively paid to the said defendant , and said defendant then received from them respectively, $, in full satisfaction and discharge of said promissory note for $, with all interest due thereon and in respect thereof; and the said promissory note for $ so paid, and the lien and claim of said defendant , on said promissory note for $, then became and were fully satisfied, and it then became and was the duty of said defendant , to deliver and return the said promissory note for $ to the plaintiff; yet the defendant, well knowing the premises, but contriving to injure the plaintiff, and extort and obtain from him divers moneys, afterward, to wit, on the day of , A. D. 18 , falsely and maliciously, wrongfully, vexatiously, and deceitfully, and without any reasonable or probable cause, indorsed said promissory note for $ to one , without any consideration whatever, and procured the said , the said being a person wholly irresponsible for costs, and insolvent, to commence an action on said promissory note for $ against the plaintiff, maliciously and willfully, and without any reasonable or probable

cause therefor, in the Court of Common Pleas within and for the county of , and claim in said action to recover the sum of $ on said note; and thus compelled the now plaintiff to appear to and defend the said action, so by said defendant maliciously, and vexatiously, and without reasonable or probable cause therefor, procured to be brought, which said defendant maliciously, falsely, and without reasonable or probable cause therefor, procured to be prosecuted to final judgment; and that such proceedings were had in said action, that afterward, to wit, at the term of said court judgment was rendered in favor of said now plaintiff for his costs, taxed to $, and said action became and was wholly ended and determined; and the plaintiff saith that thus he was put to great expense in defending said action, and was unable to collect by execution from the said the costs of said action, taxed to $, and was compelled to employ counsel to defend said action, at an expense of $, and to expend large sums of money, to wit, the sum of $, in preparing for the trial of said action, and hunting and preparing the testimony for the trial of the same; to the damage of plaintiff $.

Wherefore plaintiff demands judgment against said defendant for said sum of $, his damages so sustained.

E F, Attorney for Plaintiff.

This form is prepared from that in the case of Cotterell *v.* Jones, 7 Eng. L. & Eq. 476. It is true that the court there sustained a demurrer to it, because no damage was shown, as the petition did not show a judgment for costs. But in this country a judgment carries costs. The decisions in the United States will sustain such a petition. The cases of Closson *v.* Staples, 42 Vt. 209; S. C., 1 Am. 316; and of Whipple *v.* Fuller, 11 Conn. 581, are directly in point. But it would seem that if the action was brought in the name of the payee of the note, the same result would follow as though he indorsed to a man of straw, and induced him to bring an action in his own name. No man has a right falsely and maliciously, and without reasonable or probable cause, to commence an action against another; it is the abuse of the administration of justice, for which a mere judgment for costs is no compensation for the injury sustained. The following is the declaration in the above-cited case of Closson *v.* Staples:

266. MALICIOUS PROSECUTION OF A CIVIL ACTION.

The said A B, complains of the said C D, for that heretofore, to wit, on the day of , A. D. 18 , the said plaintiff, as surety for one E F, signed with him a certain promissory note of that date, promising to pay to the said C D or order the sum of $ in months from date; and that the said E F, the principal in said note, when said note became payable, paid to the said C D the full amount of principal and interest due thereon; and that the said C D falsely and fraudulently pretended to the said E F that said promissory note had been lost, and could not be found, so as to enable him to give up the same to the said E F, as it then became and was his duty to do; that afterward, to wit, on the day of , A. D. 18 , the said E F departed this life without ever having got possession of said promissory note so as aforesaid paid and satisfied; that after the decease of said E F, the said C D fraudulently presented said promissory note to the plaintiff, to wit, on the day of , A. D. 18 , and fraudulently demanded payment thereof from this plaintiff, he, the said C D, well knowing that the said E F, the principal in said promissory note, had in his lifetime paid and satisfied the same; and the plaintiff refused to pay the money named in said promissory note, as he told said C D the same had been paid as aforesaid, and he well knew it; yet the said C D, willfully and maliciously intending to injure, vex, and harass said plaintiff, did maliciously indorse said promissory note to one L M, he, said L M, being then a person wholly irresponsible and insolvent, and did willfully and maliciously, and without any reasonable or probable cause therefor, procure the said L M to commence a suit on said promissory note, to recover the said sum of $, with interest thereon from the day of , A. D. 18 , and that said suit was commenced on the day of , A. D. 18 , in the Court of Common Pleas, within and for the county of , and such proceedings were had in said action, that afterward, to wit, at the term of said court, A. D. 18 , a judgment therein was rendered in favor of said plaintiff, and against said L M, for costs taxed $, and that afterward, to wit, on the day of , A. D. 18 , said plaintiff issued execution on said judgment against said L M, and delivered the same to the sheriff of said county, and the same was duly returned by said sheriff, that he could find no goods or chattels, lands or tenements, of said L M whereon to levy, and plaintiff avers that said L M was and is wholly insolvent; and that said C D, in the

indorsing of said promissory note to L M, and in procuring said action to be brought and prosecuted to final judgment, acted willfully and maliciously, and without reasonable or probable cause therefor, whereby the plaintiff was put to great trouble, vexation, and expense in procuring testimony and preparing for said trial, and employing counsel to advise him in said preparation for said trial, and in defending said action, and in paying the said sum of $, costs taxed to him in said action, and in paying his attorney and counsel for his services therein $, and in $, paid out by plaintiff for his necessary personal expenses in preparing, defending, and trying said action, and other wrongs, injuries, and damages by him sustained in the premises; to his damage $.

Wherefore said plaintiff prays judgment against said C D for said sum of $, his damages so as aforesaid sustained.

L P, Attorney for Plaintiff.

The averment may be changed to one that the defendant himself did willfully and maliciously, and without reasonable or probable cause therefor, commence said action in his own name.

267. AGAINST SHERIFF FOR NOT PAYING OVER MONEY MADE ON ATTACHMENT.

The said A B complains of the said C D, E F, and G H, for that the said defendants heretofore, to wit, on the day of , A. D. 18 , made their certain writing obligatory, and thereby acknowledged themselves to be indebted to the State of Ohio in the sum of ten thousand dollars, for the payment of which they jointly and severally bind themselves, their executors and administrators; and which obligation had a condition thereunder written, and which condition was in the words following, that is to say: Whereas the above-bounden J C N has been elected to the office of sheriff of the county of , at the general election therein, on the day of , A. D. 18 . Now, therefore, if the said J C N shall well and faithfully, in all things, discharge the duties of his said office of sheriff of said county of , during his continuance therein, by virtue of said election, then this obligation to be void, otherwise to be in full force; and the said plaintiff avers that said obligation was duly approved according to law, and that said J C N duly entered upon the discharge of the duties of said office under and by virtue of said election.*

The plaintiff further avers that afterward, to wit, on the day of , A. D. 18 , the said J C N, as such sheriff, received

a large sum of money belonging rightfully to said plaintiff, under and by virtue of a certain sale of goods and chattels attached on a certain order of attachment issued in a certain action pending in the Court of Common Pleas, within and for said county, wherein this plaintiff was plaintiff, and one L M was defendant, and which goods and chattels were sold by said J C N, as sheriff, under an order of court made in said action, and on said sale said J C N made the sum of $, and which sum of money came to the hands of said J C N as such sheriff, to be paid over on the order of said court; and said plaintiff further avers that in said action such proceedings were had, that afterward, to wit, at the term of said court, he recovered a judgment thereon, against said L M, for the sum of $, and thereupon said court duly ordered said sheriff to pay to said plaintiff the money so made by him on said sale of the goods and chattels so attached, to wit, the said sum of $, after deducting the costs of suit, taxed at $, and that then and there, to wit, on the day of , A. D. 18 , the plaintiff demanded of said J C N, as such sheriff, to pay over to plaintiff the sum of $, being the sum in his hands after the payment of the costs of said action and attachment, yet the said J C N did not, nor would he pay over to the said plaintiff the said sum of $, nor any part thereof, but wholly neglected and refused so to do, whereby an action hath accrued to the plaintiff against said defendants, on said written obligation, according to the condition thereunder written.

Wherefore the said plaintiff demands judgment against said defendants for said sum of money, together with the interest due thereon from the day of , A. D. 18 .

S N, Attorney for Plaintiff.

This form is made up from the statement in the case of King et al. *v.* Nichols et al., 16 Ohio St. 80. The petition in that case contains more than is necessary. It avers the election of Nichols as sheriff before averring the giving of the bond: this is unnecessary, because the bond recites that fact and the parties are estopped by it, even if the election was wholly void; the acting as such under the bond is enough. It also sets out in detail the suit in attachment, which is unnecessary; all that need be shown is that he received the money in his official capacity, and that is shown by averring that he received under a sale of attached property in a case pending, and refused after judgment to pay it over on the order of the court. This form will answer in all cases, so far as setting forth the bond

and condition; after that the petition must contain a specific statement of the default complained of.

(*Follow the last form up to the *, and then proceed as follows:*) and the said plaintiff further saith that afterward, to wit, on the day of , A. D. 18 , he caused an execution to be issued in his favor, on a judgment rendered in the Court of Common Pleas at its term, A. D. 18 , in favor of plaintiff and against one L M, for the sum of $ debt, and $ costs of suit duly taxed, directed to the sheriff of said county, commanding said J C N, as such sheriff, to cause to be levied of the goods and chattels in his county of L M the sum of dollars and cents, which, by the judgment of the Court of Common Pleas, within and for the said county of , at the term thereof, A. D. 18 , A B recovered against L M, with interest thereon from the day of , A. D. 18 , until paid; and also the accruing costs thereon; and for want of goods and chattels, to cause the same to be levied of the lands and tenements in his county of the said L M, and have that money before said Court of Common Pleas, on or before the day of , A. D. 18 , to render unto the said A B; and have then and there this writ with his doings under the same duly indorsed thereon, and that said writ of execution afterward, to wit, on said day of , A. D. 18 , duly came to the hands of said J C N for execution, and that afterward, to wit, on the day of , A. D. 18 , the said J C N, as such sheriff, returned in the clerk's office of said court said writ of execution with the following return indorsed thereon, that is to say: Received this writ this day of , A. D. 18 , at o'clock A. M. (or, P. M.) of said day, and thereupon made diligent search for goods and chattels, lands and tenements, of said L M in my county, and could find neither goods nor chattels, lands or tenements, of said L M in my county whereon to levy and make said money; and said plaintiff avers that said return of said J C N, as such sheriff, is false in this, to wit, that said L M had goods and chattels, lands and tenements (*state it as the fact is,*) which he, said J C N, might and could have by due diligence found, and made said money out of, to wit, (*here set out the goods as far as you can, though it may not be absolutely necessary,*) which said goods and chattels, lands and tenements, were of great value, to wit, of the value of $, and which goods and chattels, lands and tenements, by said neglect of said J C N, have been wholly lost to the said plaintiff, whereby said plaintiff has lost his said debt and costs, and other wrongs and injury suffered; and

thereby an action has accrued to said plaintiff on said written obligation against said defendant to recover his damages, to wit, the sum of $ damages, which he has sustained by reason of the premises.

Wherefore he prays judgment against said defendant for said sum of $, his damages so as aforesaid sustained.

D B H, Attorney for Plaintiff.

268. AGAINST A TAVERN-KEEPER FOR REFUSING TO RECEIVE A GUEST.

The said A B, plaintiff, complains of the said C D, defendant, for that the said defendant, before and at the time of the committing the grievances hereinafter mentioned, was an innkeeper, and did keep a certain common inn for the reception and accommodation of guests and travelers, that is to say, a certain common inn called the , situate and being at , in the county of , and thereupon and therefore, and in the winter season, to wit, on the day of , A. D. 18 , the plaintiff, then being a traveler, came with, amongst other things of great value, the following goods and chattels, to wit, (*here state them,*) of great value, to wit, of the value of $, and the plaintiff was allowed to, and did enter said public inn, so kept by said defendant, with his said goods and chattels, as a guest, and the plaintiff then requested and required the said defendant to suffer and permit said plaintiff to stay and lodge at said inn as such guest as aforesaid, with the said goods and chattels, for and during the space of days; and, although the defendant then had sufficient room and accommodation in his said inn to enable him to continue the plaintiff therein as a guest during the time aforesaid, and the plaintiff was then ready and willing and able to pay, and did then and there tender to said defendant a reasonable sum of money, to wit, the sum of $, for such entertainment and lodging and accommodation, and for such necessaries as should be required by the plaintiff while so a guest at said inn, of which said premises the defendant then had notice, nevertheless the said defendant, not regarding his duty as such innkeeper, but contriving and wrongfully and unjustly intending to injure the plaintiff, and to put him to great and unnecessary trouble and expense, annoyance, distress, and inconvenience, and to expose the plaintiff so having said goods and chattels as aforesaid, to great personal danger, and the said goods and chattels to great and imminent danger of being damaged, injured, lost, or stolen, did not, nor would at the said time he was so requested, or at any time afterward, suffer or permit the plaint-

iff to stay or lodge at said inn as aforesaid, with the said goods and chattels of him, said plaintiff, during the time in that behalf aforesaid requested, but wholly refused and neglected so to do, and on the contrary thereof, at the hour of of said day, so being in the winter season, then wrongfully and unjustly turned said plaintiff, with his said goods and chattels, from and out of the said inn, so kept by said defendant, whereby said plaintiff was forced to quit said inn and compelled to seek entertainment and lodging elsewhere, and to travel with his said goods and chattels a great distance, to wit, , and to pay therefor a large sum of money, to wit, the sum of $, and to expose his said goods and chattels to be lost or stolen; the said plaintiff was thereby, upon that occasion, by means of the said several premises, put to great trouble, inconvenience, and expense, and was and is otherwise greatly annoyed, distressed, and injured, and said goods and chattels exposed to great danger of being injured or stolen; to the damage of the said plaintiff $.

Wherefore the plaintiff demands judgment against said defendant for said sum of $, his damages so as aforesaid sustained.

W W B, Attorney for Plaintiff.

This form is taken from the report of the case of Fell *v.* Knight, 8 M. & W. 269. The form will serve for a mere refusal to receive the guest by omitting all allusion to goods. The keeper of a public inn is bound to receive and entertain all persons. All the law requires of him is to find for his guests reasonable and proper accommodation; if he does that, he does all that is requisite. A tender, says Lord Abinger, C. J., should be averred of the pay. On the duties of innkeepers, *vide* 1 Roll. Abr. 3 F.; Bacon Abr., Inns and Innkeepers; White's case, Dyer, 158. Lord Kenyon, C. J., in Kirkman *v.* Shawcross, 6 Term, 17, says: "Innkeepers are bound by law to receive guests who come to their inns, and are also bound to protect the property of their guests. They have no option, either to receive or reject guests, and as they can not refuse to receive guests, so neither can they impose unreasonable terms upon them." See also Bennett *v.* Miller, 5 Term, 274; Thompson *v.* Lacy, 3 B. & Ald. 285; Newton *v.* Trigg, 1 Shower, 270; Hawthorn *v.* Hammond, 1 C. & K. 404; Broke, Action on Case, 76; Broke, Contracts, 43; 9 Coke, 87*b*. In Rex *v.* Ivens, 7 C. & P. 213, Coleridge, J., said: "The innkeeper is not to select his guests. He has no right to say to one, 'You shall come into my inn,' and another, 'You shall not,' as every one coming and conducting himself in a

proper manner has a right to be received." See also Howell *v.* Jackson, 6 C. & P. 723. While travelers are entitled to proper accommodation, they have no right to select a particular apartment, nor to use it for purposes other than those for which it was designed. Fell *v.* Knight, 8 M. & W. 269. Some of the American cases go farther, and intimate a right to exclude persons of bad habits or character. In Jencks *v.* Coleman, 2 Sumner, 221, as to common carriers of passengers, Story, J., said: "That the defendant had the right to refuse to admit on board persons who refuse to obey the reasonable regulations of the boat, or who are guilty of gross and vulgar habits of conduct, or who make disturbances on board, or whose characters are doubtful or dissolute or suspicious; and, *a fortiori*, whose characters are unequivocally bad." The analogy between the rights and duties of common carriers and innkeepers is very close, so that the decision above has a strong bearing on the rights of innkeepers to refuse guests. In Markham *v.* Brown, 8 N. H. 523, Parker, J., says: "But he is not obliged to make his house a common receptacle for all comers. . . . He is indictable if he usually harbor thieves, and he is answerable for the safe-keeping of the goods of his guests, and is not bound to admit one whose notorious character as a thief furnishes good reasons to suppose that he will purloin the goods of his guests, or his own. . . . So he may prohibit the entry of one, whose misconduct in other particulars, or whose filthy condition, would subject his guests to annoyance." See Pinkerton *v.* Woodward, 33 Cal. 557. I have no doubt that innkeepers have the right to exclude guests of a disreputable character—such persons as persons of good character could not with proper self-respect associate with.

CHAPTER XIX.

FORMS OF DEMURRER.

1. GENERAL DEMURRER.

County, ss., Court of Common Pleas.

A B, plaintiff, *vs.* C D, defendant. } Demurrer.

And now comes the said defendant, , and demurs to the petition of the said , plaintiff, and states the following cause (or, causes, *if more than one.*) of demurrer thereto, to wit:

1. That it appears from said petition that this court has no jurisdiction of the person of this defendant, (or, of the subject of this action.)

2. That it appears from said petition that the said plaintiff has no legal capacity to sue in this action.

3. That it appears from said petition that the said plaintiff has another action pending against this defendant for the same cause of action.

4. That there is a defect of parties in this action in this, to wit, that it appears from said petition that one ought to be made a party plaintiff (or, defendant,) in this cause.

5. That the said plaintiff has, in his said petition, improperly joined causes of action which can not legally be joined in the same petition.

6. That the said petition of the said plaintiff does not state facts sufficient to constitute a cause of action against this defendant, and in favor of the said plaintiff.

Wherefore the said defendant, for the cause (or, causes, *as the case may be,*) aforesaid, asks if the said plaintiff shall be permitted to have or maintain his said action thereof against this defendant.

W S, Attorney for said Defendant.

2. BY A MARRIED WOMAN.

And now comes the said , by , her next friend, defendant, and demurs, etc. (*as in first form.*)

3. BY A MINOR.

And now comes the said , by , his guardian for the suit, defendant, and demurs, etc. (*as in first form.*)

4. WHERE THE DEMURRER IS TO A PART OF A PETITION.

(*Begin as heretofore, and after the word* "demurs" *add:*) to the cause of action set forth in the first (or second, or third, or fourth, etc.,) count of the said plaintiff's petition, and states the following cause, (or, causes,) of demurrer, to wit:

1. That the said first count of the said plaintiff's petition does not state facts sufficient to constitute any cause of action in favor of the said plaintiff against this defendant.

2. That it appears from said first count that there is another action pending between the said plaintiff and this defendant for the same cause of action as is set up in said first count (or, second, etc.,) of said petition.

Wherefore the said defendant asks for the cause, (or, causes,) aforesaid, if the said plaintiff shall have or maintain his cause of action, so set forth in the said first (or, second) count of his said petition against this defendant.

5. DEMURRER TO ANSWERS.

And the said A B, plaintiff, now comes and demurs to the second plea of the answer of the said C D, defendant, (or, to the matter of defense secondly stated in the answer of the said C D,) because the facts therein stated do not constitute a defense to the action of the said plaintiff, and therefore prays judgment as in his said petition.

A B,
By , his Attorney.

For forms of demurrers to answer, setting up matter in defense, see pages and under head of "Reply."

CHAPTER XX.

FORMS OF ANSWERS.

The old rule of pleading was peremptory, that a plea must point out distinctly the matter or count to which it was intended to be applied; that it must cover all it undertook to answer, and that it must contain a sufficient bar in law to all it assumes to answer. Gould Pl. 358. Thus, if, in trespass for assault, battery, and *mayhem*, the defendant pleads to the whole matter what in law is a justification of the *assault and battery only*, the plea is ill *in toto*, and the plaintiff is entitled to damages as well for the assault and battery as for the mayhem; for an entire plea, going to the whole declaration, is indivisible in its effect, and can not operate as a bar to any part of the cause of action, unless it constitutes in law a bar to the whole. The defendant may justify a part, as the assault and battery, and plead not guilty of the mayhem. Gould Pl. 359.

The same doctrine is necessarily maintained under the code. "Defenses and counter-claims," says Hand, J., in Kneedler *v.* Sternbergh, 10 Pr. 68, "must refer to the causes of action which they are intended to answer, in such manner that they may be intelligibly distinguished. A designation or identity resting on mere probabilities or mere presumption, is too vague and equivocal to be good pleading; and a plea should answer the whole declaration or count to which it is pleaded. Root *v.* Woodruff, 6 Hill, 418; 1 Saund. 28, *a*, note 3. And it is bad for uncertainty, if it does not appear what part of the complaint it is intended to answer." So where, in an action for libel, the charge was the *scoundrel* was indicted for fraud, and the justification set up that the *defendant* was indicted for fraud, it was held bad, as not meeting the charge of *scoundrel*. The libel designates the plaintiff as such a person, and it is no justification to say he has been indicted and arrested for a conspiracy to cheat and defraud. Loveland *v.* Hosmer, 8 Pr. 215. So an answer, commencing as an answer to the whole complaint, and assuming to answer the whole, but containing facts which only constitute a defense to a part of the complaint, is bad on demurrer. Tomlinson *v.* Van Vachten, 6 Pr. 199. An answer

should cover all it professes to cover, and no more. Willis *v.* Taggard, 6 Pr. 433.

It will thus be seen that the same care is now necessary in preparing an answer as formerly in drawing a plea. The whole cause of action must be met, and it must be met with what is a *defense;* it must be met as a whole by a single bar; as it may be met in part with one fact, in part by another, and by a denial as to another part. In this way the whole cause of action may be met. To an assault and wounding, the defendant may justify the assault, and plead not guilty as to the wounding. The pleader will, therefore, be cautious to see that his answer denies, avoids, or admits the whole cause of action. The forms of answers given are, of course, given as answering the whole petition. When they are to be interposed to a particular count, where there is more than one, the answer must so state Instead of proceeding after the word "because," as in the forms, the words "as to the second (or *other*) count of the petition," or, "as to the cause of action firstly (or, secondly, etc.,) stated in the petition," should be inserted. And when a single cause of action is to be met by various answers, the part to which each answer is to be applied must be specified. Let us illustrate it by the case of Loveland *v.* Hosmer, *supra.* The charge there was twofold: *first*, a scoundrel; *second*, indicted for a fraud. The answer should have said that, as to so much of the libel as charges the plaintiff with having been indicted, he avers that he was so indicted; and, as to so much as relates to the scoundrel, he pleads not guilty, or he admits it, or he justifies it separately. Such an answer would have met the whole case.

The former rules of pleading in this respect, as well as in so many others, are therefore in full force, and a knowledge of them is just as important now as ever. No lawyer can understand the code until he has mastered Gould and Chitty. The code implies the existence of a methodical and logical system of pleading, and only undertakes to abolish its mere technical *forms*, while it leaves in full play its principles and its logic. Hence these principles and this system of logic must be mastered before one can aspire to the dignity of a *pleader*, even under the code.

The forms which are here given, as to general and special denials, are designed to lead the parties to a single and definite issue. In actions for torts, it is almost impossible to frame special denials which will not in fact amount to the old plea of not guilty The special issues given are mere hints for the pleader—mere suggestions to aid him in the mode and manner of framing such denials.

It is important to adopt a form as brief as possible. It must hit the real fact in controversy, stripped of all immaterial accidents. A jury best comprehends such an issue, and will pass upon it much more understandingly than upon one which denies all the details, as well as the main and material fact.

There is another matter which may be here referred to, and that is, the practice of *making admissions* in an answer. There is a specimen of this fault in the case of Pendleton Street Railroad Co. *v.* Shires, 18 Ohio St. 255, 259, in which case an answer was filed occupying a page and a half of the report, made up of mere admissions and explanations; whereas all the case called for was a simple denial that the defendant was guilty of the negligence alleged against it. There is nothing in the old form of pleading at law, nor in the code, which justifies such a practice. The code, even in a case in equity, has abolished discovery, and hence, in that class of cases, the answer is restricted to a simple pleading. The code declares that what is not denied is for the purposes of that case admitted; but it is only admitted for that limited purpose: it is no estoppel in another case; whereas these admissions under oath made in an answer, would be evidence against the party in another case, like any other admission of a fact. There is danger, then, in inserting these unnecessary admissions. They ought to be stricken out as irrelevant and improper matter inserted in the answer. As I have already said, an answer by the code must be one or all of these four matters: 1. A denial of the whole or some part of the petition; 2. New matter constituting a defense to the case made in the petition; 3. A counter-claim; 4. A set-off. There is here no ground for admissions, or explanations, at least, in an action at law. So, too, in an action in equity, a denial meets the case, if the facts are not correctly stated. The defendant, even in that case, can find no authority in the code, as in the old practice, for denying the matter as stated and then going on to state the case as the defendant understands it. That was necessary under the old practice, because discovery was sought; hence, the pleader in equity was compelled first to state his pleading, and then to take the witness-stand and state what he knew of the matter in contention. This last is abolished substantially by the code.

The answer in the case I speak of denies matters not contained in the petition; it denies it made the excavation across the street: the petition does not so aver; it says the excavation was made by the water-works trustees. Is this new matter inserted by way of

defense or what? The gist of the action was negligence in handling the horses, whereby they ran away and against the plaintiff. That was the fact to be denied and the fact the plaintiff had to prove. Hence, an answer denying the negligence charged was a denial of all that was material in the petition, and all that was necessary to deny. All else was true; the running of the railroad and the excavation across the street were the only other facts in the case.

I notice this case as a good illustration of what is an abuse in pleading, conducing largely to the increase of the record, to the confusion of the jury and to the increase of the expense of litigation. It is an abuse pretty general in practice, and originates in indolence, in the pleader not wishing to submit to the mental effort requisite to ascertain what is material and what is not; hence the pleader stuffs his own argument in the view he takes of the case into the record, where it is an unlawful intruder.

The code is not to be blamed for this; it is the loose practice that has grown up in spite of the code, and has been tolerated by the court. It should cease, and the code have a fair chance of being used by lawyers in a lawyer-like manner; and then there will be a chance for it to become a symmetrical system for attaining the ends of justice.

Some have objected to the use of the words "in manner and form as the said plaintiff hath declared against him." These words were in the old forms, and were inserted to make the plea more specific and definite in its application to the cause of action set forth in the declaration. In this form, the old general issue was a specific denial of the particular cause of action declared on. One judge held, I am told, that such a denial was bad, because he might be indebted or have promised in some other form. It has usually been deemed sufficient to deny the specific charge alleged in the petition; the plaintiff must recover on that specific cause of action, or not recover at all. It would seem, therefore, that a denial of that cause of action as stated in the petition, ought to be a sufficient denial; nay, all the denial that the petition admitted of.

The forms of answers naturally divide themselves into two great classes:

1. *Denials.*
2. *The statement of new matters.*

DENIALS.

This class again also divides itself into two classes—*general* and *special.*

I. *General Denials.*

We will arrange these under the heads of *contract* and *tort.* And contracts again must be divided into actions to recover on the common counts, and special contracts; and these again into contracts not under seal, and contracts under seal.

1. ANSWER TO COMMON COUNTS.

County, ss., Court of Common Pleas.

A B, plaintiff, *vs.* C D, defendant. } Answer.

And now comes the said C D, defendant, and for answer to the petition of the said A B, plaintiff, saith that the said plaintiff ought not to have his said action against him, the said defendant, because he saith that he, the said defendant, does not owe the said plaintiff the said sum of $, in manner and form as the said plaintiff hath, in his said petition declared, nor any part thereof; and of this he puts himself upon the country.

C D,
By E F, his Attorney.

This form was inserted in the first edition, and has, in New York, been held sufficient in a certain class of cases; in those cases where the petition avers a certain sum due as the balance of an account. In Simmons *v.* Sisson, 26 N. Y. 264, the petition alleged in substance that the intestate in his lifetime, while acting as treasurer of the plank-road company, advanced and laid out in keeping the road in repair a large sum of money, amounting to about $800 over and above the amount received by him for tolls, etc., and that there was due $744.74, on account of said advances. The defendant answered, saying that the said company was not indebted to said intestate in said sum of $744.74, or in any other sum whatever for money expended in repairing the road, or in any other manner. Selden, J.: "The first defense is the exact equivalent of *nil debet* at common law. It may admit of some doubt whether *nil debet* was a proper answer to the complaint. The facts stated in the complaint are peculiar, and do not vary materially from an *indebitatus* count in debt, according to the ancient forms

of pleading. The statement of the advances to the amount of about $800, beyond tolls and earnings, is not put forth as the cause of action, but only as inducement; the cause of action being that at the time of the death of the intestate, there remained due to him a balance of advances over and above tolls and earnings, the sum of $744.74, and for this sum judgment is demanded." To such a complaint, I think the ancient plea of *nil debet* is a good answer under the code. In Gates *v.* Wheeler, 2 Hill, 233, Bronson, J., says: "In debt for rent by indenture, or for an escape, or for a *devastavit* by executor, it has been held that the indenture, or the judgment, is but inducement; and that the arrears of rent, the escape, and *devastavit* are the foundation of the action; in these cases *nil debet* is a good plea." Pullis *v.* Giddings, 8 Johns. 82; Dartmouth College *v.* Claugh, 8 N. H. 28. In the case of Quin, Adm'r, *v.* Lloyd, 41 N. Y. 349, where the count alleged services without stating amount or time of service, but saying that there was a balance due therefor of $333.07, as services in Europe, and in $296.31, for services in New York, it was held that on an answer of a general denial, proof of payments might be received. These cases, especially the first, show that an answer of *nil debet* can not be objected to on the trial. If allowed to stand, it amounts to a general denial, and puts plaintiff on proof of all the allegations of his petition. S. P., Morley *v.* Smith, 4 Kan. 183. Under the new rules of pleading in England, the plea to the common counts is that the defendant was *never* indebted to the said plaintiff in said sum so demanded, nor in any part thereof, in manner and form as the plaintiff hath in in his declaration alleged. 17 C. B., N. S. 708; 101 Eng. C. L. 299; Johnson *v.* Gibson, 16 Eng. L. & Eq. 282; Clothier *v.* Gann, 16 Ib. 460. This plea puts in issue simply the existence of the original indebtedness, and does not, as in *nil debet*, put in issue the existence of an indebtedness at the commencement of the action. Hence, all payments made on this original debt must be set up by answer, and can not be proved under this plea of never indebted. This form of the plea is probably the true form on an answer to an action on the common counts. And yet the case in New York may be good law, and applicable to a case which sets out indebtedness, claiming a balance to be due on it; on that averment met with a *nil debet* arises an issue on what is the balance really due on the matters involved in the petition. But when the count is in the common form, the true answer is that the defendant was never indebted; or, admitting a sum once due, and payment to that part and never indebted as to balance. I add a form under this view

of the law, similar to the English form, which will meet all objections to a plea of *nil debet*

2. NEVER INDEBTED, TO COMMON COUNT.

And now comes the said defendant, and says that plaintiff ought not to have and maintain his aforesaid action thereof against him, because he saith that he never was indebted to the said plaintiff in said sum of $, nor in any part thereof, in manner and form as said plaintiff hath in said petition alleged against him, and of this he puts himself upon the country.

E F, Attorney for Defendant.

3. DENIAL OF PART AND ADMISSION OF PART.

And now comes the said C D, defendant, and for answer to the petition of the said A B, plaintiff, saith that he, the said defendant, admits that he does owe the said plaintiff the sum of $, parcel of the said sum of $, so by the said plaintiff, in his said petition above, demanded; and he, the said defendant, consents that said plaintiff may have judgment in his, said plaintiff's, favor, and against the said defendant, for the said sum of $, so admitted to be due; and the said defendant further saith that, as to all the rest and residue of said sum of $, so demanded, the said plaintiff ought not to have his said action thereof against him, the said defendant, because he saith that he does not owe the said plaintiff the rest and residue of said sum of $, or any part thereof; and of this he puts himself upon the country.

C D,

By E F, his Attorney.

NOTE.—See Houghton *v.* Townsend, 8 Pr. 441.

These forms will answer to all petitions on the common counts, claiming a sum of money for goods sold, money paid, money had and received, work and labor performed, and on an account stated. The effect will be to deny the claim of the plaintiff, and nothing will be put in issue but the truth of the claim set up by the plaintiff. Every defense which admits the existence of the plaintiff's claim at one time, must be specially set up in the answer.

4. TO PROMISSORY NOTES, BILLS OF EXCHANGE, ETC.

And now comes the said C D, defendant, and for answer to the petition of the said A B, plaintiff, saith that the said plaintiff ought

not to have his aforesaid action thereof against him, the said defendant, because he saith that he, the said defendant, did not undertake and promise, in manner and form as the said plaintiff hath, in his said petition, alleged against him; and of this he puts himself upon the country.

It would seem that this should be held a sufficient general denial. It denies the promise made, as it is set forth in the petition, and the plaintiff must prove the making and giving of the note, and a note of the tenor and effect of the one set up in the petition.

5. ANOTHER FORM.

And the said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that the said plaintiff ought not to have his aforesaid action thereof against this defendant, because he saith that he, the said defendant, did not make and deliver to the said plaintiff the said promissory note (or, bill of exchange, etc.,) in said petition set forth, in manner and form as is therein alleged; and of this he puts himself upon the country.

6. TO CONTRACT UNDER SEAL.

And the said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that the said plaintiff ought not to have his said action thereof against him, because he saith that the said writing obligatory, in the said petition mentioned, is not the act and deed of the said defendant: and of this he puts himself upon the country.

C D,
By , his Attorney.

It will be well enough to adopt this old form, when an issue is to be raised on the execution of a deed. The extent of this issue is well settled, and then can, therefore, be no uncertainty as to what it puts in issue; whereas any other form might lead to confusion. The question raised by this plea is simply the execution of the deed; and any fact which goes to show that the defendant did not execute it, so as to render it his deed, can be given in evidence—as that it was different from what it was represented: so also that it has been altered in a material part: for if so, then it is not the deed that the party executed.

7. IN TORT.

And the said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that the said plaintiff ought not to have his aforesaid action thereof against the defendant, because he saith that he, the said defendant, is not guilty of the said several supposed grievances, so in said petition laid to his charge, or any part thereof, in manner and form as the same are therein set forth and alleged; and of this he puts himself upon the country.

This general form will answer in all cases where formerly an action of trespass, trover, or case would lie, and will put in issue all the material averments of the plaintiff's petition. This form must be adopted, or the plea of denial must be just the transcript of the petition, with a negative inserted before each material allegation, which would be unnecessary prolixity, and would lead to multiplied questions as to whether all that was material had been traversed. This form is sanctioned by Salinger *v.* Lusk, 7 Pr. 430.

8. DENIAL OF NEGLIGENCE.

And now comes the said defendant, and says that said plaintiff ought not to have and maintain his aforesaid action thereof against him, because he saith that he denies that he is guilty of the carelessness, negligence, and improper conduct, or either of them, in manner and form as the said plaintiff hath in his said petition alleged against him; and of this he puts himself upon the country.

W B L, Attorney for Defendant.

This form will be proper in all that numerous class of cases, where the plaintiff alleges the *negligence* of the defendant as the ground of action. In these cases, there are usually averments by way of inducement, as to the truth of which there is no dispute; the contention being whether the plaintiff received his injury in consequence of some negligence or default on the part of the defendant. These actions are becoming very numerous, and it will be convenient to have some general and brief denial which will meet all, or nearly all of the cases. Of this character, are actions for injuries received on railroads; by being run over; by careless driving of horses; by falling into holes carelessly left open; and by the various other circumstances under which the injury may have been sustained by the negligence of another. The practice

now is in many cases, as I have before stated, to draw a long answer, filled with admissions, qualifications, reservations, and denials, all mixed up together, when the only *material* averment is the *negligence*, carelessness, and improper conduct of the defendants. If, as in railroad cases, the negligence is that of the agent or servant, it is still the act of the master, or principal, and should be so plead. The jury are never mislead, when the issue is narrowed down to a simple point; but are very liable to be, when the answer is drawn out to a great length, and filled up with immeterial matters.

9. A VERY GENERAL DENIAL, APPLICABLE TO ALL CASES.

And now comes the said C D, defendant, and for answer to the petition of the said A B, plaintiff, saith that the said plaintiff ought not to have his aforesaid action thereof against this defendant, because he saith that he denies, all and singular, the allegations averred by the said plaintiff in his said petition, in manner and form as the same are therein stated; and of this he puts himself upon the country.

This form of a general denial seems to have been held sufficient by the Supreme Court of New York, in Dennison *v.* Dennison, 9 Pr. 246. It may be applied to all cases, whether in contract or tort, in law or equity. And, unless constant disputes are to be met with in every case, it is absolutely necessary to have some such general form, the meaning and scope of which shall become fixed and settled, known and recognized, so that every one may know that in using it, there can be no misunderstanding. Then parties will know exactly what is in issue; what is to be proved on the one side, and what disproved on the other. Whereas, if every one is to be left to frame what he may call his general denial, there will be constant disputes as to what is or is not covered by the answer; and the court will be constantly disagreeing with the pleader as to the extent and meaning of his answer, and he and his client will be subjected to constant vexation and expense in groping their way to what is the material issue in a case.

It matters not so much what the form is, so there is one to which all can apply, with the certainty of doing just what they intend to do, and nothing else. Though this may not be the essence of justice, it is opening and grading a well-beaten path leading to its attainment. The means are almost as important as the end. Without public highways, one may attain the end of a

journey, but it will be after much delay, and uncertainty, and vexation, and great expense; so one may attain justice without forms, but it must also be after much delay, and uncertainty, and vexation, and great expense. The case of Lewis *v.* Coulter decides that a general denial should be of *each and all*, etc. The word *material* should not be attached to the allegation. 10 Ohio St. 451.

II. *Special Denials.*

10. DENYING A NOTE, BILL, OR CONTRACT.

And now comes the said C D, defendant, and for answer to the said petition of the said A B. plaintiff, saith that he did not make and deliver the said promissory note, (bill of exchange, check, or contract, *as the case is*,) in the said petition of the said plaintiff set forth and described; and of this he puts himself upon the country.

C D,
By E F, his Attorney.

11. IN ACTIONS ON NOTES, BILLS, ETC.

And the said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, says that—

1. The said did not indorse and deliver the said promissory note, (bill of exchange, check, *or other negotiable contract*,) to the said , as the said plaintiff hath in his said petition alleged.

2. The said promissory note, (or, bill of exchange, check, etc.,) in the said petition described was not, when the same became due and payable, presented to the said , for payment, and payment thereof by the said refused, as the said plaintiff has in his said petition alleged.

3. He, the said defendant, did not have due and legal notice of the said demand and non-payment of the said promissory note, (bill of exchange, etc.,) as the said plaintiff hath in his said petition alleged.

4. The said did not accept the said bill of exchange in the said plaintiff's petition described, in manner and form as is therein alleged.

5. The said bill of exchange, in said plaintiff's petition described, was not duly presented to the said for acceptance, and the acceptance thereof refused, as the said plaintiff hath in his said petition alleged.

6. The said defendant had not due and legal notice that the said bill of exchange, (or, check, etc.,) in the said plaintiff's petition described, was presented to the said for acceptance, and that the said , on such presentation, refused to accept the same, as the said plaintiff hath in his said petition alleged.

7. Due and diligent search was not made when the said bill of exchange, (or, promissory note, etc.,) became due and payable, to discover the residence and person of the said , at , or elsewhere, in order that the said bill of exchange, in said petition described, might be presented to the said for payment, in manner and form as the said plaintiff has in his said petition alleged.

And of this the said defendant puts himself upon the country.

12. INDORSEE *v.* MAKER.

And the said C D, defendant, now comes, and for answer to the said petition of the said A B, plaintiff, saith that the said plaintiff ought not to have the said action against him, because he saith that the said (*payee,*) did not indorse and deliver the said promissory note, (or, bill, etc.,) to the said plaintiff, in manner and form as the said plaintiff hath in his said petition alleged; and of this he puts himself upon the country.

13. INDORSEE *v.* INDORSER.

(*Proceed as in the last to the blank, then proceed:*) defendant did not indorse the said promissory note, in said plaintiff's petition mentioned, in manner and form as the said plaintiff hath therein alleged, and of this he puts himself upon the country.

14. PAYEE *v.* DRAWER.

And the said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that the said plaintiff ought not to have his said action against him, because he saith that he, the said defendant, did not draw and deliver to the said plaintiff the said bill of exchange, in manner and form as the said plaintiff hath in his said petition declared against him; and of this he puts himself upon the country.

15. INDORSEE *v.* DRAWER.

And now comes the said C D, defendant, and for answer to the petition of the said A B, plaintiff, saith that the said plaintiff ought not to have his said action against him, because he saith that he,

the said defendant, did not draw and deliver to the said , (*the payee,*) the said bill of exchange in said petition described and set forth;

Or, that the said , (*payee,*) did not indorse and deliver the said bill of exchange to the said plaintiff;

Or, that the said , (*the payee,*) did not indorse said bill of exchange to the said , (*first indorsee;*)

Or, that the said , (*first indorsee,*) did not indorse the said bill of exchange to the said , (*second indorsee;*)

Or, that the said , (*second indorsee,*) did not indorse said bill of exchange to the said plaintiff, as is set forth in said petition;

Or, that the said , (*plaintiff,*) did not cause said bill of exchange, when the same fell due, to be duly presented to the said , (*drawee,*) and payment thereof demanded, according to the tenor and effect of said bill of exchange;

Or, that the said , defendant, was not duly and legally notified that said bill of exchange had been duly presented to the said , (*drawee,*) and payment thereof refused.

16. INSURANCE.

And the said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that the said plaintiff ought not to have his said action against him, because he saith that—

1. The said defendant did not make and deliver the said policy of insurance, as the said plaintiff hath in his said petition alleged; and of this he puts himself upon the country.

2. The said plaintiff did not own the said goods and chattels, (or, the said dwelling-house and furniture,) at the time of the happening of said loss, as in the said petition alleged; and of this the said defendant puts himself upon the country.

3. The said defendant did not, within the time limited in the schedule attached to the said policy, make out or deliver, within a reasonable time after the said loss, a particular account of such loss and damage, signed by the hand of the said plaintiff, and verified by his oath or affirmation; but to make out and deliver the same did neglect, for the space of months after said loss; and of this the said defendant puts himself upon the country.

4. The said defendant did not procure, nor has he procured, the certificate, under the hand of a magistrate, or notary public, as is, by the schedule attached to the said policy, required of the said plaintiff; but to procure the same the said plaintiff hath wholly

neglected; and of this the said defendant puts himself upon the country.

17. AWARDS.

And the said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that the said plaintiff ought not to have his said action thereof against him; because he saith that—

1. The said defendant did not assume and promise, in manner and form as the said plaintiff hath in his said petition alleged; and of this he puts himself upon the country.

NOTE.—This meets the promise of submission in the case of a parol submission. It puts that in issue and nothing else.

2. The said did not make and publish his award, in manner and form as the said plaintiff hath in his petition mentioned; and of this he puts himself upon the country.

NOTE.—This will put in issue the award itself; its being made and published as a binding award on the parties.

3. The said plaintiff did not tender and offer to the said defendant the said promissory note before the commencement of this action, as he hath in his petition alleged; and of this he puts himself upon the country.

18. WARRANTIES.

And the said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that the said plaintiff ought not to have his said action thereof against him; because he saith that—

1. He, the said defendant, did not promise the said plaintiff, in manner and form as the said plaintiff hath in his said petition alleged; and of this he puts himself upon the country.

2. The said horse, in said petition mentioned, was not unsound, as the said plaintiff hath in his said petition alleged; and of this he puts himself upon the country.

NOTE.—The first plea will put in issue the truth of the warranty as alleged; and the second, the fact of unsoundness at the time of the sale or exchange.

3. The said defendant did furnish to the said plaintiff the said goods and chattels, properly packed and fit to be sent to the said English market; and of this he puts himself upon the country.

4. The said goods and chattels were not wholly unfit for the purpose in said petition stated, nor did the said plaintiff lose the benefit thereof, as he hath in his said petition alleged; and of this he puts himself upon the country.

NOTE.—It may be doubtful whether this last traverses a material allegation. There may be but two here: *First.* The promise. *Secondly.* The breach. The balance is a mere question of damages.

19. ON SALES OF REAL ESTATE.

And the said defendant now comes, and for answer to the petition of the said A B, plaintiff, saith that the said plaintiff ought not to have his said action against him; because he saith that—

1. He did not promise the said plaintiff, in manner and form as the said plaintiff hath in his said petition alleged; and of this he puts himself upon the country.

NOTE.—This puts in issue the contract of purchase, as that was what the promise related to; and hence this issue ought to put that whole matter in issue; because unless there was such a sale, there could be no promise to pay as alleged.

2. The said plaintiff did not tender to the said defendant the said sum of $, the residue of said purchase money, in manner and form as the said plaintiff hath in his said petition alleged; and of this he puts himself upon the country.

3. The said defendant did not refuse to make, and procure to be made, to the said plaintiff a good title to the said premises, in manner and form as the said plaintiff hath in his said petition alleged; and of this he puts himself upon the country.

4. The said plaintiff did not, nor would he, tender a good and sufficient deed of general warranty, conveying the said premises to the said defendant, in manner and form as the said plaintiff hath in his said petition alleged; and of this he puts himself upon the country.

5. The said plaintiff was not seized of an estate in fee simple in and to the said premises, so that he could make a good title thereto to the said defendant, as he has in his said petition alleged; and of this the said defendant puts himself upon the country.

6. The said plaintiff did not notify the said defendant of the said second sale of said real estate, and demand from him the said sums of money, as the said plaintiff hath in his said petition alleged; and of this he puts himself upon the country.

7. The said plaintiff did not sign, by himself or agent, any memorandum or agreement in writing, binding the said defendant to pay for the said lands so sold, in manner and form as the said plaintiff hath in his said petition declared; and of this he puts himself upon the country.

20. GUARANTIES.

And the said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that the said plaintiff ought not to have his said action against him; because he saith that—

1. He did not promise the said plaintiff, in manner and form as the said plaintiff hath in his said petition declared; and of this he puts himself upon the country.

2. The said plaintiff did not sell and deliver the said goods and chattels to the said E F, in manner and form as the said plaintiff hath in his said petition declared; and of this the said defendant puts himself upon the country.

3. The goods and merchandise so sold by the said plaintiff to the said E F, were not suitable for, nor required by, the said E F, in the way of his said trade, as the said plaintiff hath in his said petition declared; and of this he puts himself upon the country.

4. The said plaintiff did not, nor would, give the said defendant reasonable notice that he, the said plaintiff, had or would credit the said E F, in manner and form as the said plaintiff hath in his said petition alleged; and of this he puts himself upon the country.

The first issue will raise the question of a legal guaranty, and that must be in writing; the second will test the accuracy of the sales to E F; the third, whether the goods were such as would be covered by the guaranty; the fourth, whether the proper notice was given of the acceptance of the guaranty. See note to petition.

21. PROMISES TO MARRY.

And the said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that the said plaintiff ought not to have her said action against him; because he saith that—

1. He, the said defendant, did not assume and promise, in manner and form as the said plaintiff hath in her said petition thereof declared against him; and of this he puts himself upon the country.

2. The said plaintiff has not always been ready and willing to marry the said defendant, nor did she, on the said day in said petition mentioned, offer to marry the said defendant, in manner and form as the said plaintiff hath in her said petition declared; and of this he puts himself upon the country.

3. The said defendant did not, nor has he, refused to marry the said plaintiff, in manner and form as she has in her said petition declared; and of this he puts himself upon the country.

The bad character of the plaintiff, if existing at the time of the promise, and unknown to the defendant, renders the promise void, and should be admitted under the first issue; but her subsequent misconduct would now have to be specially pleaded, it is believed, since it admits the contract, but seeks to avoid it by subsequent facts—facts which amount to a release and discharge.

22. PROMISE TO SERVE AND EMPLOY.

And the said C D, defendant, now comes, and for answer to the said petition of the said A B, plaintiff, saith that the said plaintiff ought not to have his said action against him; because he saith that—

1. He did not assume and promise, in manner and form as the said plaintiff hath in his said petition declared against him; and of this he puts himself upon the country.

2. He did not refuse to receive and employ the said plaintiff on his request, as the said plaintiff hath in his said petition alleged; and of this he puts himself upon the country.

3. The said plaintiff did not offer himself to the said defendant to enter into his employment and service, as he hath in his said petition averred.

4. The said defendant did perform his said work, in said petition mentioned, in a good and workmanlike manner; and of this he puts himself upon the country.

5. The said defendant did perform all the said work and labor he was to perform, in and by virtue of the said contract, and did not leave unperformed the work, as is in said petition alleged; and of this he puts himself upon the country.

23. AGENTS, ETC.

And the said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that the said plaintiff

ought not to have his said action against him; because he saith that—

1. He did not promise the said plaintiff in manner and form as the said plaintiff hath in his said petition alleged; and of this he puts himself upon the country.

2. The said defendant did not sell and dispose of the said goods and merchandise for a bad and insufficient bill of exchange, as the said plaintiff hath in his said petition alleged; and of this he puts himself upon the country.

It is doubtful whether this last issue will be held good. Ought he not to meet it by setting out the sale and the bill he did take? In that case, the answer would be that "he sold said goods to one E F, he, the said E F, then being a man in good standing and credit, for the sum of $; and for the payment of which sum he took the bill of the said , drawn on and accepted by , payable in months after date; and the said defendant avers that the said bill of exchange was at the time held and considered an approved bill."

24. BY-LAWS.

And the said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that the said plaintiff ought not to have his said action against him; because he saith that—

1. He does not owe the said sum of money, by the said plaintiff in the said petition demanded, in manner and form as is therein set forth; and of this he puts himself upon the country.

2. The said defendant did not keep the said gunpowder within the corporate limits of said town, in manner and form as the said plaintiff hath in said petition declared; and of this he puts himself upon the country.

3. There is no such by-law in force in the said town of , as the said plaintiff hath in the said petition set forth and declared; and of this he puts himself upon the country.

4. The said defendant did not, as is alleged in said petition, rent to the said E F the said premises, to be kept and used by the said E F as and for the purpose of permitting and carrying on therein gaming, as the said plaintiff hath in the said petition alleged; and of this he puts himself upon the country.

25. JUDGMENT.

And the said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that the said plaintiff ought not to have his said action against him; because he saith that there is no such record of said recovery now remaining in the said Court of Common Pleas, in manner and form as the said plaintiff hath in his said petition declared; and this he prays may be inquired of by this court.

26. OFFICIAL BONDS.

The special issues or denials will be:

1. That the defendants did not make and deliver the said writing obligatory.

2. That there is no record remaining in said Probate Court of the said accounting and judgment, as is in said petition averred.

All other defenses must be by new facts, as the settlement is a judgment, and the parties can not impeach its veracity.

On sheriff's bonds, special denials may be put into the bond, to the judgment, to the issue of the execution, to the existence of the return; the return can not be contradicted. Under the old practice, *nil debet* was held a good plea. Hyatt *v.* Robinson et al., 15 Ohio, 372. This plea admitted the bond, and put in issue the facts set up to constitute an introduction to, and a breach of, the bond. It would be well if it should be again sanctioned by the court, under the code, as a sort of general special denial in such cases; it will be more convenient than a special denial of each material averment separately. If allowed, it might be in this form:

(*After the introduction to the word* "because," *proceed as follows:*) "they say that they do not owe the said plaintiff the said sum of money, by him in his petition demanded, or any part thereof, in manner and form as the said plaintiff has in his said petition declared; and of this they put themselves upon the country."

27. LANDLORD AND TENANT.

The special denials in these actions may of course be many.

1. The lease may be denied. 2. That he does not owe the rent. 3. That he has committed no waste. 4. That no repairs were necessary, etc. It is unnecessary to give forms for them.

28. FOR INJURIES TO PERSONS AND ANIMALS.

(*After the introduction, proceed:*)

1. That the said defendant is not the owner (or, harborer, *as the averment is*,) of the said dog, in the said plaintiff's petition mentioned; and of this he puts himself upon the country.

2. That the said defendant did not know that the said dog was accustomed to bite mankind (or, was of a ferocious or mischievous nature); and of this he puts himself upon the country.

3. That the said dog did not kill and injure the cattle (or, hogs, horses, sheep, etc.,) of the said plaintiff, as he hath in his said petition set forth; and of this he puts himself upon the country.

4. That the said plaintiff, by reason of the wrongs in said petition complained of, has not sustained damage to the said sum of $, as he has in his said petition averred; and of this he puts himself upon the country.

This last one seems unnecessary, since the same issue is raised on an inquiry of damages. In these cases, the oath of plaintiff does not extend to the amount of damages claimed. *Vide* secs. 112 and 127 of Code, 2 S. & C. 983, 987. Section 127 will justify such a traverse.

29. OBSTRUCTING STREET.

1. The said defendant did not wrongfully obstruct the said public highway, (or, street.) in manner and form as the said plaintiff hath in his said petition complained against him.

2. The said plaintiff was overturned in his said carriage, as he has in his said petition alleged, of his own fault and negligence, and not for the reason in his said petition alleged.

30. LEAVING HOLE OPEN.

1. The said defendant denies that he was possessed of the said premises, in the said petition described, at the time in the said petition named.

2. The said plaintiff of his own fault and negligence fell into the said hole, and not in manner and form as he hath in his said petition set forth.

3. The said defendant did not permit the said hole to be and remain open, to the great danger of persons passing along said highway, (or, street,) as the said plaintiff hath in his said petition declared.

31. FLOWING WATER.

1. The said plaintiff is not possessed of the said premises and mill, in his said petition described, in manner and form as therein averred.

2. The defendant did not erect or keep up the said dam, in manner and form as the said plaintiff hath in his said petition declared.

3. The said defendant did not flow the water back upon the mill of the said plaintiff, in manner and form as the said plaintiff hath in his said petition declared against him.

4. The said defendant did not divert the water in said stream, in manner and form as the said plaintiff hath in his said petition declared against him.

32. MALICIOUS PROSECUTION.

1. The said defendant did not maliciously cause the said writ of attachment to be issued, in manner and form as the said plaintiff hath in his said petition declared against him.

2. The said defendant did not falsely and maliciously, and without probable and reasonable cause, cause the said plaintiff to be arrested, in manner and form as the said plaintiff hath in his said petition declared against him.

33. LIBEL AND SLANDER.

Little else than not guilty can be pleaded as a denial in an action of this character. A justification must be pleaded as new matter. The inducement, where there is one, may be denied—as in slander of one in his profession, in his title, etc.

34. COMMON CARRIERS.

1. The said defendant says that he is not a common carrier, as the said plaintiff hath in his said petition alleged against him.

NOTE.—As to who is a common carrier, see Samms *v.* Stewart, 20 Ohio, 69.

2. The said defendant did not receive the said goods and chattels of the said plaintiff, in manner and form as the said plaintiff hath in his said petition alleged.

35. FALSE REPRESENTATIONS.

1. The said defendant did not make the representation in said petition set forth, in manner and form as therein alleged.

2. The said defendant did not, at the time he so made the said representation in said petitions set forth, know that the same were untrue and false.

3. The said defendant did not sell to the said plaintiff the horse in the said petition mentioned, in manner and form as is therein alleged.

36. COLLISIONS.

The special denials are few in these cases; the plea of not guilty is the one to raise the true issue. The defendant may deny—

1. That he was the owner and possessed of the said wagon, etc., by which the injury was done.

2. That he did not through negligence run foul of and against the wagon, boat, or vessel of the plaintiff.

3. That the plaintiff is not the owner of the wagon, boat, etc., injured.

4. That the said collision happened from the fault of the plaintiff, and not from that of the defendant, as is in said petition alleged.

37. BY A SHERIFF.

The sheriff may aver—

1. That there is no record of the judgment.

2. That said execution did not come into his hand.

3. That he did not levy on the said goods and chattels in said petition named.

4. That he did not leave the same with the said defendant.

5. That the said goods were not lost.

6. That the said E F was not justly indebted to the said plaintiff in the said sum of $, as the said plaintiff has in his said petition alleged.

7. That the said plaintiff caused said writ of capias to be issued without having filed any sufficient affidavit to authorize the issuing thereof.

NOTE.—It was held that a sheriff was not liable for failing to execute a capias issued contrary to law. Gates *v.* Maxon, 2 Western Law Journal, 405.

8. That the said defendant did not permit the said E F to go at large and escape, as is in said petition alleged.

9. That the said defendant did not arrest the body of the said E F, as is in said petition alleged.

38. BY A WITNESS.

The witness may answer—

1. That the said plaintiff did not cause the said defendant duly to be served with a subpena, as the said plaintiff hath in his said petition alleged.

2. That the said defendant did not willfully refuse to attend at the time and place of the said trial, as the said plaintiff hath in his said petition alleged.

39. IN TROVER.

It may be averred—

1. That the said goods and chattels are not the property of the said plaintiff, as he hath in his said petition alleged.

2. That the said defendant did not convert the said goods and chattels, in manner and form as the said plaintiff hath in his said petition described.

40. IN ASSAULTS.

The only issue in these cases is not guilty. There can be no special denial, since there is but one fact averred—the assault. Where a battery also is charged, or a wounding, or any other great bodily harm, the pleader must understand the facts of the case. If there was no wounding, he may plead not guilty as to that, and justify as to the balance. *Vide* Special Pleas in Justification.

41. TRESPASS TO GOODS.

The answer will be—

1. That the said goods and chattels are not the property of the said plaintiff, as he hath in his said petition alleged.

2. That the said defendant did not take the said goods and chattels, as the said plaintiff hath in his said petition alleged.

3. That the said plaintiff was not possessed of the said goods and chattels, as the said plaintiff hath in his said petition alleged.

42. TRESPASS TO REAL PROPERTY.

The defendant may answer—

1. That the said plaintiff was not possessed of the said premises, in the said petition described, in manner and form as the said plaintiff hath therein alleged.

2. That the said plaintiff was not entitled to the possession of the said premises, in manner and form as he hath in his said petition alleged.

3. That the said defendant did not break and enter the premises of the said plaintiff, in manner and form as he hath in his said petition alleged.

4. That he did not take and carry away the said goods and chattels, in said petition named, as the said plaintiff hath in his said petition alleged.

The first denial will put in issue simply the possession of the plaintiff. Trespass is a wrong to this, and no one not in possession can sustain trespass.

The second will probably raise a question involved under the plea of not guilty, the title of the plaintiff as against that of the defendant. If this denial will not raise that question, then title must be specially pleaded.

The third is a denial of the entry simply, and it must be held to admit everything else, unless under this issue the question of title might be raised. If the denial was that he did not *unlawfully break and enter*, possibly the question of title might be raised under this issue.

The fourth denial is immaterial, unless the count is so framed that a recovery can be had for the goods alone; otherwise the taking of the goods is a mere matter of aggravation, and so not issuable.

5. That the said defendant did not unlawfully break and enter the close of the said plaintiff, as the said plaintiff hath in his said petition alleged.

NOTE.—This denial of breaking the close of the plaintiff may best raise the question of title. It was on account of this averment in the forms, that title was held to be put in issue in the old action of trespass.

6. That the said close mentioned in said petition is not the close of the said plaintiff, in manner and form as the said plaintiff hath therein declared.

NOTE.—Keyse *v.* Powell, 18 Eng. L. & Eq. 411. This seems to be the form under the new rules in England for raising the question of title.

NEW MATTER CONSTITUTING A DEFENSE.

43. TO JURISDICTION.

And now comes the said C D, defendant, and for answer to the petition of the said A B, plaintiff, saith that the said court here ought not further to take cognizance of, or sustain the action aforesaid; because he says that the cause of the action aforesaid, if any accrued to the said plaintiff, accrued to him, the said plaintiff,* within the county of , and within the jurisdiction of the Court of Common Pleas, within and for said county of , and not within the county of , within the jurisdiction of this court; and this he is ready to make appear.

44. ANOTHER FORM.

(*Follow the last to the* *, *then add:*) out of the jurisdiction, to wit, at the county of , and not in the said county of , (*where suit is brought,*) in said petition named, or elsewhere within the jurisdiction of this court; and this he is ready to make appear.

These forms will answer when the action is brought in the wrong county under section 45, subdivisions 1, 2, and 3. The suit in these cases must be brought in the county where the land lies, and not elsewhere. The averment that the cause of action accrued to the plaintiff in the county where the land lies, is sufficient under the code, since it was so under the old practice. Story's Pleading, 7. So the causes of action mentioned in section 47 are also local; and if brought in the wrong county, this form of plea or answer will be sufficient.

There may occur cases where a more specific statement of the facts may be necessary. If so, they must arise under sections 48 and 52. In such cases the following forms may be preferable:

45. ANSWER BY CORPORATION CREATED BY THE LAWS OF THIS STATE.

And the said C D, defendant now comes, and for answer to the petition of the said A B, plaintiff, saith that the court here ought not further to take cognizance of, or sustain the action aforesaid, because the said defendant saith that the said defendant * is a corporation created by the laws of this State, and that its principal office and place of business is situate at , in the county of , and not in the said county of , (*where suit is,*) within

the jurisdiction of this court; and this the said defendant is ready to make appear.

46. THE SAME BY A FOREIGN CORPORATION.

(*Follow the last to* *, *then continue as follows:*) is a foreign corporation, created by the laws of the State of , and not by the laws of this State, and that there is no property of said defendant, nor any debts due and owing to the said defendant in the said county of , (*where suit is;*) and this the said defendant is ready to make appear.

47. MATTERS IN ABATEMENT.

And the said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that the said A B ought not to prosecute his said action against him; because he saith that the work, and labor, and money, mentioned in the petition of the said A B, was done and paid by the said plaintiff for and at the request of the defendant, jointly with one E F and G H, who are all living, and ought to be joined as defendants in this action; and this he is ready to make appear.

This is the form adopted and held good in Sweet *v.* Tuttle, 10 Pr. 40, 162. And it was there held that it might be joined with matter pleaded in bar of the action. The same doctrine is maintained in Bridge *v.* Payson, 5 Sandf. S. C. 210; but the contrary doctrine was held in Gardner *v.* Clark, 6 Pr. 449. The decision in Sandford was made by the Superior Court of New York city; and the one in 10 Pr., by Marvin, Bowen, and Green, JJ., of the Supreme Court, while the decision in 6 Pr. was made by Allen, Hubbard, and Pratt, JJ., of the Supreme Court. The preponderance is in favor of allowing the plea to be put in with other matter in bar. The last decision was made after time had been given to discuss the two conflicting cases, and may be supposed to reflect the present opinion of the courts of the State. The same question came up again in 10 Pr. 162, and was decided as the prior case had been.

48. PLAINTIFF AN INFANT OR MARRIED WOMAN, SUING WITHOUT A NEXT FRIEND.

And the said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that the said A B ought not to be permitted further to prosecute his said action; because

he saith that the said A B is an infant, under the age of twenty-one years, (or, eighteen years, *if a female;* or, was, at the commencement of this suit, under coverture of one , her husband, and that said is still living at ;) and this he is ready to make appear.

49. WANT OF PARTIES.

And the said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that the said plaintiff ought not to be permitted further to prosecute his action aforesaid against this defendant; because he saith that are tenants in common with the said plaintiff in the lands and tenements set forth and demanded in said petition, and that the said are not made parties to this action; and this he is ready to make appear.

50. FOR DEFECT OF PLAINTIFFS.

And the said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that the said plaintiff ought not to be permitted further to prosecute his said action; because he saith that the said sum of money, in said petition demanded, is not due from this defendant to the said A B alone;* but that the same is due and owing from this defendant to one , who is still living, jointly with the said A B; and this he is ready to make appear.

51. WANT OF DEFENDANTS.

(*Follow the last to the* *, *then proceed:*) but that the same is due, and owing from this defendant, jointly with one , who is still living, to the said plaintiff; and this he is ready to make appear.

The above forms are proper where the petition is on the *indebitatus* counts, or when no contract to pay is set forth. Where the petition sets forth a contract, the following form must be used:

52. DEFECT OF PLAINTIFFS.

And the said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that the said plaintiff ought not to be permitted further to prosecute his said action; because he saith that the said contract, (or, several contracts,) in his said petition set forth, was, (or, were, each and every one of them,)* made by the said defendant, not with the said A B, plaintiff, alone, but

by this defendant with the said A B, jointly with one , who is still living; and this the said defendant is ready to make appear.

53. DEFECT OF DEFENDANTS.

(*After* * *in above, add:*) not made by this defendant separately with the said plaintiff, but was (or, were) made by this defendant, jointly with one , who is still living, and not otherwise; and this the said defendant is ready to make appear.

54. MISNOMER OF PLAINTIFFS.

And the said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that the said plaintiff ought not to be permitted further to prosecute his said action, because he saith that the said plaintiff is named, and known, and called by the name of , and not by the said name of , as is in said petition averred; and this the said defendant is ready to make appear.

55. MISNOMER OF DEFENDANT.

And , sued by the name of C D, in the action of said A B, plaintiff, now comes, and for answer to the petition of said A B, plaintiff, saith that the said plaintiff ought not to be permitted further to prosecute his said action; because he saith that this defendant is named, known, and called by the said name of , and not by the said name of C D, as he is in said petition named; and this he is ready to make appear.

56. COVERTURE OF DEFENDANT.

And the said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that the said plaintiff ought not further to be permitted to prosecute his said action; because she saith that she was, on the day of the commencement of this suit, covert of one , her husband, and that the said is still living at , in the county of , and State of ; and this she is ready to make appear.

Sturges *v.* Burton, 8 Ohio St. 215, when to answer and when to demur. *Vide* this case.

57. ANOTHER ACTION PENDING.

And the said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that the said plaintiff ought not to be permitted further to prosecute his said action; because

he saith that heretofore, on the day of , A. D. 18 , the said plaintiff commenced an action against this defendant in the Court of Common Pleas, within and for the county of , and State of , against this defendant, for the same cause (or, causes) of action set forth in the said petition of the said plaintiff, as by the record thereof will appear; and that the said action so heretofore commenced by the said plaintiff against this defendant still remains undetermined in said court of ; and this the said defendant is ready to make appear.

NEW MATTER IN BAR OF ACTION.

Statute of Limitations.

58. CONTRACTS NOT IN WRITING, OR LIABILITY CREATED BY STATUTE, OTHER THAN A FORFEITURE.

And the said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that the said plaintiff ought not to have his said action thereof against this defendant; because he saith that the said cause (or, *if more than one*, said several causes.) of action in the said plaintiff's petition set forth, did not accrue to the said plaintiff against this defendant * within six years next before the commencement of this action; and this he is ready to make appear.

59. CONTRACTS IN WRITING.

Follow the above to *, *then add:*) within fifteen years next before the commencement of this action; and this he is ready to make appear.

The above forms will answer for all actions with a mere change of the time of limitation. *Four years* are the limitation for actions for trespass on real property, for injuring, taking, or detaining personal property, whether the property is specifically demanded or not; for injury to the rights of the plaintiff not arising on contract or before provided for; an action for relief, on the ground of fraud, is to date from the discovery of fraud. *One year* to actions for libel, slander, assault, battery, malicious prosecution, false imprisonment, on a statute for a penalty or forfeiture, unless the statute creating the penalty or forfeiture fixes a different limitation. *Ten years* to actions on official bonds, or undertakings of executor, administrator, guardian, sheriff, or other officer, and upon bonds

given in attachment, injunctions, arrest, or in any case whatever required by statute; also in an action for relief not provided for in previous cases.

60. BY EXECUTOR OR ADMINISTRATOR.

And the said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that the said plaintiff ought not to have his said action against this defendant; because he saith that more than four years next before the commencement of this suit, to wit, on the day of , A. D. 18 , he, the said defendant, was, by the Probate Court, within and for the county of , duly appointed administrator of the goods and estate of the said , (*the intestate*,) and then and there accepted that trust, and that afterward, within three months from his acceptance of the said trust as aforesaid, to wit, on the day of , A. D. 18 , he did cause a notice of his said appointment to be published three consecutive weeks, in the , a newspaper of general circulation in said county of ; and this he is ready to make appear.

61. CLAIM REJECTED AND NOT SUED IN SIX MONTHS.

(*Follow the above to the word* "because," *then say:*) because he saith that the said plaintiff, more than six months before the commencement of this suit, to wit, on the day of , A. D. 18 , did present the said claim against the estate of the said , deceased, to this defendant, as such administrator, for allowance; and this defendant did then dispute and refuse to allow said claim as a valid claim against said estate; and this defendant further saith that said claim has never been referred, in conformity to the provisions of the statute in such case made and provided; and this he is ready to make appear.

Where the claim is not due at the time, and it is presented for allowance, it must be sued in six months after it becomes due, or it will be barred. Swan's Stat. 378, sec. 88. Hence, in such a case, the form would have to be changed.

62. WHERE THE CLAIM IS NOT DUE WHEN REJECTED.

(*Begin as in* 59:) because he saith that the said plaintiff did, on the day of , A. D. 18 , present and exhibit said claim to this defendant, as administrator as aforesaid, for allowance, and that this defendant did then dispute the justness of said claim,

and refused to allow the same as a valid claim against the estate of the said , deceased; and this defendant further saith that the said plaintiff did not, within six months after the said claim became due, according to the tenor and effect of said promissory note (or, bill of exchange, contract, etc., *as the case may be.*) commence a suit for the recovery thereof against this defendant, as such administrator; and this he is ready to make appear.

In case of an executor, these forms may have to be changed very slightly in the averment of the appointment.

The averment might be that the said caused the last will and testament to be admitted to probate, and took upon himself the execution of said trust, by giving surety as the law requires.

An administrator or executor can not, by a new promise, revive a claim once barred, even under the general statute of limitation. Drouillard *v.* Wilson, Adm'r of White, 10 West. Law J. 385; Hill *v.* Henry, 17 Ohio, 9; Ex'r of Niemcewicz *v.* Bartlett's Adm'r, 13 Ohio, 271. In Massachusetts it has been repeatedly decided that the four years limitation could not be waived by the personal representative. Brown *v.* Anderson, 13 Mass. 201; Dawes *v.* Shed, 15 Ib. 6; Ex parte Allen, 15 Ib. 58; Thompson *v.* Brown, 16 Ib. 172; Heath *v.* Watts, 5 Pick. 140.

Can a plea of the statute of limitation be set up after a default? Yes. *Vide* Wood *v.* Ward, 10 West. Law J. 505, where the whole law of the question is examined; and the cases of Sheets *v.* Baldwin, 12 Ohio, 120, and Newsom's Adm'r *v.* Barr, 18 Ib. 240, are commented on and explained. The Ohio cases simply decide that it is in the discretion of the court to permit it; and no court has a right, in its discretion, to refuse to one what it permits to another. What right has the court to say to A, "You may plead the statute," and to B, "You shall not?"

63. INFANCY.

And the said C D, defendant, now comes, by E F, his guardian for the suit, and for answer to the petition of the said A B, plaintiff, saith that the said plaintiff ought not to have his said action thereof against this defendant; because he saith that, at the time of making said contract and promise, (or, said several contracts and promises, *if more than one count,*) he, the said defendant, was an infant within the age of twenty-one years, (or, eighteen years, *if a female,*) to wit, of the age of years, and no more; and this he is ready to make appear.

64. COVERTURE.

And the said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that the said plaintiff ought not to have his said action against this defendant; because she saith that, before and at the time of making the said contract and promise, (or, the said several contracts and promses,) in said petition set forth, she, the said defendant, was, (*if husband is alive*, and still is,) the wife of and married to one , (*if alive, add*, and who is now living at , etc.;) and this she is ready to make appear.

65. TWENTY-ONE YEARS OF ADVERSE ENJOYMENT OF REAL ESTATE

And the said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that the said plaintiff ought not to have his aforesaid action against him; because he saith that the said cause of action did not accrue to the said plaintiff within twenty-one years next before the commencement of this action; and this he is ready to make appear.

It is probably not necessary to plead the limitation in an action for the recovery of real estate, though it may be pleaded.

66. TWENTY-ONE YEARS ENJOYMENT OF AN EASEMENT.

And the said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that the said plaintiff ought not to have his said action against him; because he saith that the said defendant, and those under whom he claims said premises, have, for more than twenty years next before and preceding the bringing of this action, continuously kept up the said dam and flowed back the said water of said stream, in manner and form as the said plaintiff hath in his said petition declared, adversely to the right of the said plaintiff and those under whom he claims the said premises and the title thereto; and this he is ready to make appear.

Under the code, such a defense must be pleaded; and as all fictions are prohibited, such a defense can not, as formerly, be set up under the pretense of a grant. The truth must be set forth, and that is not a grant, but an adverse possession ripening into a right in twenty years.

67. DURESS.

And the said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that the said plaintiff ought not to have his said action against this defendant; because he saith that the said defendant, before and at the time of making said promissory note (or, bill of exchange; or, contract in writing, *as the case may be*,) in said petition set forth, was imprisoned by the said plaintiff, and others in collusion with him, at , in the county of , and was then and there kept and detained in prison, until he, the said defendant, through force and restraint of that imprisonment, there made and gave the said promissory note to the said plaintiff; and this he is ready to make appear.

68. TENDER.

And the said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that the said plaintiff ought not to have his said action thereof against him, the said defendant; because he saith that, after the said sum of money so in the petition of the said plaintiff demanded, to wit, the said sum of $, became due and owing from this defendant to the said plaintiff, he, this defendant, did, on the day of , A. D. 18 , tender to the said plaintiff the said sum of $, together with $, interest then due thereon, who then refused to receive the same; and the said defendant further saith that, from the time of making the said tender up to the time of the commencement of this suit, the said defendant always hath been, and still is, ready to pay to the said plaintiff the said sum of $, principal, and the said sum of $, interest then due thereon, if the said plaintiff will accept the same; and he further brings said sums of money here into court, ready to be delivered to the said plaintiff, whenever he will accept the same; and this he is ready to make appear.

Where the plaintiff demands a larger sum than the defendant admits to be due, and the defendant has tendered the sum which he admits to be due, the answer must assume a twofold character —that of a tender of what is admitted to be due, and a denial of indebtedness beyond that sum. The above form can be easily varied to suit such a case. The defendant can say, that, "as to , parcel of said sum of $, so by the said plaintiff demanded, the said defendant did tender the same," as is stated in the above form, leaving out, of course, all mention of interest, if that is included

in the sum tendered, and then proceed: "and the said defendant further saith that, as to the residue of said sum of $, so demanded, he does not owe the same to the said plaintiff;" or if he has paid the balance, then answer that, "as to the balance, he has paid the same to the said plaintiff." Or the balance may be composed of illegal interest, and then, after the plea of tender, the answer must set out the facts which show the illegal consideration of that part of the note. Indeed, an answer setting up a tender of part may be joined with any other defense which the defendant may have to the balance claimed, whether that defense is founded upon facts which show that the money was never due, or that there has been a part failure of consideration, or that the sum has been paid, released, or discharged in any other way, or it may be met by a set-off. Fuller *v.* Pelton, 16 Ohio, 457. A tender always admits the cause of action as stated, and the amount tendered to be due. 7 Taunt. 487; 4 Term, 194. The tender must always be kept good; hence, if the plaintiff demands the sum tendered, the party must pay it at once, if he is at home, or as soon as he can reasonably go there. Town *v.* Trow, 24 Pick. 168; 8 N. H. 509; 8 Ib. 367. Where the tender has been made by a deceased joint contractor, the answer can easily be so framed as to show the joint nature of the contract, and then a tender by such deceased joint contractor.

A tender to be valid must be *without conditions*, absolute. Thus, in 2 Greenl. on Ev., sec. 605, "it is laid down that it must also appear that the tender was *absolute;* for, if it be *coupled with a condition*, as, for example, if a larger sum than is due be offered and the creditor be required to return the change, or if the sum be offered in *full of all demands*, or if it be on condition that the creditor will give a receipt, or release, or if it be offered by way of boon with a denial that any debt is due, or if any other terms be added, which the acceptance of the money would cause the other party to admit, the tender is not good. The authorities seem to be unanimous to the same effect." Per Bailey, J., in Shaw *v.* Sears, 3 Kan. 242, 243.

69. ARBITRAMENT.

And the said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that the said plaintiff ought not to have his said action,* because he saith that, after the accruing of the cause (or, several causes, *if there are more than one in petition,*) of action, and before the commencement of this action, on

the day of , A. D. 18 , the said plaintiff and defendant submitted themselves to the arbitration of, and engaged to abide by and perform the award and determination of , chosen and selected by the mutual consent of the said plaintiff and defendant, to award and determine of and concerning all and every cause or causes of action then mutually existing and subsisting between the said plaintiff and defendant, so that the said arbitrator, (or, arbitrators, *if more than one*,) should make and publish his award and determination, of and concerning the said premises, on or before the day of , then next following; and the said defendant saith that the said arbitrator (or, arbitrators,) before the expiration of the time limited for making said award, to wit, on the day of , A. D. 18 , took upon himself the burden of awarding and determining in the said premises, and the said arbitrator, (or, arbitrators,) upon the hearing of the said parties to said arbitration, upon the premises aforesaid, found that, (*here set out the award literally, or according to its legal effect*,) and the said defendant saith that the said plaintiff afterward had due and legal notice of the making and publication of the said award and determination, and thereupon the said defendant did, on his part, execute and fulfill all that he was by said award required and bound to execute and fulfill; and this he is ready to make appear.

If the award has not been executed, then the last averment will be omitted. An award is conclusive as to all matters submitted. Fidler *v.* Cooper, 19 Wend. 285; Emmet *v.* Hoyt, 17 Ib. 410; Green *v.* Danby, 12 Vt. 338. A mere submission, without an award, is no bar to an action. Gore *v.* Chadwick, 6 Dana, 477. A general submission, and an award under it, will not bar an action on a claim not laid before the referees; but if any evidence is offered as to the claim, it will be barred. Warfield *v.* Holbrook, 20 Pick. 531.

The effect of an award was well stated by Gardner, C. J., in Bragill *v.* Isham, 12 N. Y. 9; 2 Kern. 9. He says: "The award of Stagg, the arbitrator, if valid, and insisted upon in the answer of the defendant, would have constituted a legal bar to this action. There is, or ought to be, no difference in the effect of an adjudication, as a bar to a subsequent suit, for the same cause, whether it is pronounced by judges selected by the parties, or appointed by the State. In either case, every consideration of public policy requires that after the parties have been once fully and fairly heard, further litigation as to the same matters should cease, and no satisfactory reason can be assigned why a judgment, as an act by the

law, should estop the parties, and an award, which is another name for a judgment, which the parties have expressly stipulated should be final as to the subjects submitted, should not be equally conclusive." 3 Caine, 166; 12 Johns. 310; 1 Hill, 44; 9 Johns. 37; 12 Wend. 578; 1 Selden, 457; 2 Ib. 44; Kyd on Awards, chap. 8. The case in 2 Tyrwhitt, 113; 2 Cromp. & Jer. 47, disproved of.

70. ACCORD AND SATISFACTION.

(*Follow above to* *;) because he saith that, after the said sum of money so demanded in said petition became due, and before the commencement of this action, to wit, on the day of , A. D. 18 , he, the said defendant, delivered to the said plaintiff, (*here state the money or property delivered,*) of great value, in full satisfaction and discharge of the said sum of money, so by the said plaintiff in this action demanded, and which said (*here again insert the articles,*) he, the said plaintiff, then accepted and received of and from the said defendant, in full satisfaction and discharge of the said sum of money in said petition demanded; and this he is ready to make appear.

71. SATISFACTION OF A LARGER SUM BY A LESS.

(*Follow* 67 *to* *;) because he saith that the said defendant was indebted in said sum so demanded, to the said plaintiff, and which sum was payable to the said plaintiff at his residence at , in the county of , and State of ; and the said defendant further saith that, while the said sum was so due, he, the said defendant, paid to the said plaintiff, at the Bank of America, in the city of New York, the sum of $, in full satisfaction and discharge of said sum of $, so demanded by the said plaintiff in his said petition, and which said sum of $ he, the said plaintiff, then and there accepted and received of and from the said defendant, in full satisfaction and discharge of the said sum of money now, by the said plaintiff, in this action demanded; and this he is ready to make appear.

For this form, see Harper *v.* Graham, 20 Ohio, 105, where it was held that a less sum might be a satisfaction of a larger, if it is paid at a different place from that where the party is bound to pay. So it would seem if paid by a surety, or by a friend who was not bound for the debt.

Where the cause of action is on a written contract, the language may be varied.

72. TO A WRITTEN CONTRACT.

(*Follow* 67 *to* *;) because he saith that after the making of the promissory note (or, notes, bill, or bills of exchange, contract, or contracts,) set forth in said petition, and before the commencement of this action, to wit, on the day of , A. D. 18 , he, the said defendant, delivered to the said plaintiff, (*here state the thing delivered, whether note, bill, or property, as the case may be,*) in full satisfaction and discharge of said promissory note, (*or as above,*) and of all sums of money in said petition demanded; and which he, the said plaintiff, then accepted and received of the said defendant, in full satisfaction and discharge of the said promissory note, (or, notes, etc.,) and of all sums of money in said petition demanded; and this he is ready to verify.

Where the note, bill, etc., of a third person is given, it must be specially set forth, as if one was declaring upon it; and so of a bond.

Where suit is brought on an account, the defendant may plead that the account was settled, and a note, bill, or other contract, was given and received, in satisfaction of the account. *Vide* form in 3 Chitty Pl. 926; 5 Term, 513; 10 Mod. 37. Under our code, such a plea must be good, since the plaintiff must declare specially in all cases; and hence, if he has a note, he must declare on it.

73. BILL FOR CONDITIONAL PAYMENT GIVEN AND LOST.

And the said C D, defendant, now comes, and for answer to the said petition of the said A B, plaintiff, saith that, as to $, parcel of the said sum of $, so demanded in said petition, the said plaintiff ought not to have his said action against him;* because he saith that, after the accruing of the cause of action for the said sum of $, and before the commencement of this suit, the said plaintiff drew on the said defendant a bill of exchange for the said sum of $, payable to the order of the said plaintiff five months after date, which said bill the said defendant then accepted and delivered to the said plaintiff; and the said plaintiff took and received said bill, for and on account of the said sum, and the said plaintiff afterward, [and before said bill became due and payable,] lost the said bill out of his possession, and from thence hitherto the same has remained so lost, and the said plaintiff has never been able to find and produce said bill to the said de-

fendant, nor know where the same is; and this the said defendant is ready to make appear.

This form, without the words in brackets, was held a bar to an action at law. The receipt of the bill *for and on account of said sum* was a conditional payment; and while the bill remained outstanding, the conditional payment remained. The plaintiff could rescind it only by delivering up the bill. Crowe *v.* Clay, 25 Eng. L. & Eq. 451. In Ohio, it has been held that a suit at law may be maintained, if note is lost after it is due. Thayer *v.* King, 15 Ohio, 242. The party paying has a right to an indemnity, if he pays the note or bill. This can not be given in an action at law. Nor has the code altered this law; the petition on a lost note must set forth that fact, and offer a bond of indemnity. Hence it becomes a case in equity, to be tried by the court, and not by a jury. Nor does it seem unreasonable that an indemnity should be given in all cases of a lost note, without regard to the time when lost, whether before or after due. The finding of a jury in the action that the note was lost when overdue, does not bind the holder; but if the plaintiff should falsely prove it lost after due, when he had lost it before, and it had passed into the hands of a *bona fide* holder, the maker would have to pay it a second time. The first judgment would be no bar to the second suit. The holder, therefore, who has lost the note or bill ought to be required to provide against all possibility of loss to the payer.

74. PAYMENTS BY NOTE, BILL, ETC.

(*Follow above to;**) because he says that, after the creation of the said debt and demand, by the said plaintiff in said petition demanded, and before the commencement of this suit, the said plaintiff and defendant settled an account by and between them, of and concerning the said matter set forth in said petition, and of and concerning divers other matters then existing by and between said parties; and upon said accounting, the said defendant was found indebted to the said plaintiff in the sum of $, and for which sum of $, he, the said defendant, then made and delivered to the said plaintiff his promissory note in writing, payable to the said plaintiff, or order, in days after date thereof; and the said plaintiff then received said promissory note of this defendant, in full satisfaction and discharge of all matters embraced within said accounting; and the said plaintiff afterward, on the day of , A. D. 18 , indorsed said promissory note

to one , for a valuable consideration; whereby the said defendant became liable, and still is liable, to pay said sum of $ to the said , (*the indorsee;*) and this he is ready to make appear.

Vide Steadman *v.* Goode, 1 Esp. 3; 1 Ld. Raym. 680; 1 Burr. 9; 1 Esp. 230, 53, 167; 5 Term. 513, 516.

75. CONTRACT DISCHARGED BY A NEW ONE, TO PAY IN A PARTICULAR WAY.

And the said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that the said plaintiff ought not to have his said action against him; because he saith that, after the making of the agreement in the petition of the said plaintiff mentioned, and before a breach thereof, (or, promissory note, bond, bill, etc., and before the same became payable,) to wit, on the day of , A. D. 18 , the said defendant agreed with the said plaintiff, that he, the said defendant, should and would pay the said sum of money mentioned in the said agreement, (promissory note, bill, etc.,) to the said plaintiff, in manner following, that is to say, that the said defendant would deliver, (*here state the property or thing to be delivered, how and where,*) and the said defendant saith that he did, according to said agreement, deliver to the said plaintiff the said , in payment of the money named in said first-named agreement, and that the said plaintiff did then accept and receive the same, in full satisfaction of the said sum of money, so due and owing from the said defendant to the said plaintiff; and this he is ready to make appear.

C D,
By , his Attorney.

This was held a good bar against not only the payee, but the indorsee of a note, in Ward *v.* Walton, 4 Ind. 75. If the suit is by an indorsee, the plea should aver that, before breach, and without notice of any assignment to the said plaintiff, he make the new agreement and payment. "It is, no doubt, competent," says the court, "for parties, before breach, to enter into a verbal contract providing for its discharge by the delivery of property, or in any other mode agreed upon between them." Ib. 77. In Rhodes *v.* Thomas, 2 Ind. 638, it was held that parties to a written contract, not under seal, may, after its execution, dissolve, or

waive, or discharge, or qualify the contract, or any part of the same, by a new verbal contract, and such waiving, etc., if made before breach, will be a good defense in a suit on the contract. The new contract is a bar without execution, if made on a sufficient consideration. As where the payee agreed that, if the payer would procure logs and saw a certain amount of lumber, he would receive the same in payment, and the defendant averred that he did proceed, and procure logs, and had sawed and delivered a part, and was proceeding to saw and preparing to deliver the residue. This was the case presented in Ward *v.* Walton, *supra*.

76. PAYMENT IN CARPENTER WORK ON A NOTE AFTER DUE.

(*Follow last form to the word* "because," *and then proceed:*) because he saith that after the said promissory note became payable, and before the commencement of this suit, to wit, on the day of , A. D. 18 , the said plaintiff agreed to receive, and the said defendant agreed to give to the said plaintiff, his work, as a carpenter, to the amount due and payable on the said promissory note; and the said defendant avers that he did afterward, according to the said agreement, do and perform for the said plaintiff carpenter work to the full amount due and payable on the said promissory note; and this he is ready to make appear.

C D,
By , his Attorney.

This plea was held good in the case of Louden *v.* Birt, 4 Ind. 566, overruling the dictum—in Sinard *v.* Patterson, 3 Blackf. 353—that a plea of payment could not be supported unless the payment had been made in money alone. "Payment," says the court, "may be made in anything that the creditor will accept as payment. And under a general plea of payment, payment in anything that has been accepted, or received as payment, may be proved. And in these cases, it is a question for the jury, whether what may have been given and received was a payment or not, in the particular case." 2 Swan's Pr. 702; Chitty on Contr. 750; Moore *v.* Studden et al., Wright, 88; Willard *v.* Germer, 1 Sandf. S. C. 50. The allegation that a debt had been fully paid, in a manner stipulated in a previous agreement between the parties, would seem to imply an acceptance of the thing delivered or furnished in payment. Where the agreement is specific as to the thing to be done or delivered, it may be well enough to set it forth,

and aver that it was accepted as payment; but where the agreement is general—that it shall be paid in lumber, or other property, or in work, without specifying the quantity—there a plea of this character will be sufficient, and indeed will state the whole agreement.

Where the payment is made to the payee, and a suit is brought by an indorsee after due, the plea is still good, by averring the contract with the payee, and before assignment to the plaintiff; because the note being paid, ceased to be negotiable, unless negotiated before due to a *bona fide* holder for value. The note, in the case of Louden *v.* Birt, had been assigned, and the suit was in the name of the assignee.

77. ANSWER THAT PLAINTIFF HAD NOT OFFERED TO CONVEY LAND, TO BE CONVEYED WHEN FIRST OF SEVERAL NOTES BECAME DUE.

(*Follow preceding form to the word* "because," *then proceed:*) because he saith that the sole consideration of the said three several writings obligatory, in the said petition mentioned, was and is the sale of a certain piece or parcel of land, situate in the county of , and State of , and known and described as, (*here describe the land sold;*) and the said defendant further saith that, at the time of making said several promissory notes, the said plaintiff agreed to convey the said premises to the said defendant by deed of general warranty, at the time when the said sum of money, named in the said writing obligatory, described in the first count of the said plaintiff's petition, should and did become due and payable, to wit, on the said day of , A. D. 18 ; and the said defendant also then agreed, on the delivery of the said deed of conveyance, to pay to the said plaintiff the said sum of $, mentioned in the said writing obligatory, and to execute and deliver to the said plaintiff a mortgage on the said premises, to secure the payment of the sums of money mentioned in the two several writings obligatory, described in the second and third counts of the said plaintiff's petition; and the said defendant avers that he has been ready and willing to pay the first-named sum of money, and execute and deliver said mortgage, on the delivery by the said plaintiff of the said deed of conveyance; yet the said plaintiff did not, nor would he, on the said day of , A. D. 18 , nor at any time since, offer to convey the said premises to the said defendant, on the payment of the sum mentioned in the said writing obligatory, in the said first count described, and the execution of a

mortgage by the said defendant as aforesaid, to secure the sums of money mentioned in the other writings obligatory, in plaintiff's second and third counts described; and this he is ready to make appear.

C D,
By , his Attorney.

This plea was held a good bar to an action on the three notes mentioned, brought after they all became due, in the case of Ellis *v.* Hubbard, 4 Ind. 206. By the terms of the agreement, as set out in the plea, says the court, the payment of the first note, and the execution of a mortgage to secure the other two, on the part of the vendee, and the execution of the deed by the vendor, were dependent acts. Either party suing for a breach of the contract, in such a case, in order to entitle himself to recover, must show a performance, or a conditional offer to perform whatever was to be done on his part. If Ellis were suing to compel Hubbard to execute the conveyance, it would then be incumbent on him to aver that he had paid or tendered the money and mortgage; but standing in the position of a defendant, it was only necessary for him to show, in order to defeat the suit, that the plaintiff had failed to perform the part of the contract incumbent upon him to perform, according to the terms and conditions of the agreement. This view is fully sustained by later cases. The case of McCulloch *v.* Dawson, 1 Ind. 413, and the authorities there cited, abundantly fortify this assertion, and sustain the court in overruling a different decision on the same point, in Burrows *v.* Yount, 6 Blackf. 458; Ireland *v.* Chauncey et al., 4 Ind. 224; Best *v.* Ellsworth, 4 Ib. 261; Mix *v.* Smith, 4 Ib. 499.

78. TO SPECIAL CONTRACT TO DELIVER CORN—ANSWER THAT PLAINTIFF AGREED TO FURNISH A THRESHING MACHINE, AND DID NOT.

(*Follow the former forms to the word* "because," *then proceed:*) because he saith that, at the time of the making of the agreement mentioned in the petition of the said plaintiffs, the said plaintiffs agreed, in writing, with the said defendant that, in consideration that he would deliver to the said plaintiffs, at their warehouse in , the fifteen hundred bushels of shelled corn above mentioned, they, the said plaintiffs, would pay the said defendant twenty cents a bushel therefor, and would furnish to the said defendant a thresher to thresh said corn for one cent a bushel; and

the said defendant saith that the said plaintiffs failed and refused to furnish said thresher, though the said defendant did, on the day of , A. D. 18 , request the said plaintiffs so to do; whereby the said defendant was disabled from performing his contract aforesaid; and this he is ready to make appear.

C D,
By , his Attorney.

This was held a good plea in bar to an action on a contract, whereby the defendant had agreed to deliver fifteen hundred bushels of shelled corn at the warehouse of plaintiffs, in Lafayette, on the 1st day of October next thereafter, and the plaintiffs to pay twenty cents per bushel. "Taking the allegations in the plea to be true upon the demurrer," says the court, "the furnishing of the thresher is shown to have been a part of the consideration of the sale of the corn, and a condition precedent to the delivery. The failure of the plaintiffs to perform that condition excused the defendant from performing his agreement, and indeed probably disabled him to make performance. Bembridge et al. *v.* Stoddard, 4 Ind. 587. *Vide* also Coe *v.* Smith, 1 Ind. 267.

79. PLEADING TO A PETITION AVERRING A GENERAL PERFORMANCE OF CONDITIONS PRECEDENT.

And the said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that the said plaintiff ought not to have his said action against him; because he saith that he agreed with the said plaintiff to buy the said wool, in the petition mentioned, for the purpose of reselling the same in the way of his, the said defendant's, trade and business of wool-dealer, and thereby acquiring gains and profits; and that wool is an article that fluctuates greatly in price in the market, and that the said defendant could only resell the said wool as aforesaid, when, and not before, he, the said defendant, had notice of the same being shipped, and when, and not before, the name of the vessel in which it was so shipped had been declared, according to the said contract in the said petition mentioned; of all which premises the said plaintiff, at the time of the making of the said agreement, had notice; and the said defendant further saith that, although the said plaintiff had such notice, yet he, the said plaintiff, did not declare to the said defendant the name of the vessel in which the said wool was shipped, at or within the time at or within which he was, by the said agreement, bound to declare, that is to say, as soon as such

wool was so shipped; but omitted so to do, and delayed and omitted so to declare the name of the said vessel in which the said wool was so shipped, or to give the said defendant any notice of the same being so shipped, for a long and unreasonable time after the same had been so shipped; and the said defendant had not notice of the shipment of the said wool, or of the name of the vessel in which the same had been so shipped, until after the expiration of a long and unreasonable time after the same had been so shipped, and after the said plaintiff was bound to, and ought to have given and declared the same, and ought and could have done so; and the said defendant further saith that, between the time that the name of the said vessel ought to have been declared, according to the said agreement, in said petition mentioned, and the time when it was first declared to the said defendant, or when he first had notice of the sailing of the said ship, with the said wool on board thereof, the price of wool in the market had greatly fallen, and the said wool thence continually remained so fallen in price, and the same, when the name of the said vessel was first declared, and when the said defendant first had notice or knowledge of the same having been so shipped, would sell or could be sold only for a much less sum of money than it would have done at the time when the said plaintiff ought to and could have declared the name of the said vessel, or given the said defendant such notice as aforesaid; wherefore the said defendant did not, nor would accept or pay for the said wool in the said petition mentioned; and this the said defendant is ready to make appear.

C D,
By E F, his Attorney.

This plea is copied from the case of Graves *v.* Legg, 25 Law & Eq. 562, where it was held a good bar; since the naming of the vessel was a condition precedent, according to the agreement as set forth in the declaration and plea. The declaration averred a *general performance* of all conditions precedent. The plea sets forth one of the conditions, and says that the plaintiff did not perform that. This is the manner of pleading adopted in England, under a statute, which permits a general averment of the performance of conditions precedent by the plaintiff. And it would seem that the same rule ought to be adopted in the construction of the code. The petition avers generally a performance. An answer denying this would be bad, for either putting nothing in issue, or in putting too much in issue; as it specifies no particular condition, the per-

formance of which is denied. Hence, the answer ought to set out the particular condition, as the above plea does, and then aver that the plaintiff did not perform that particular one. The case of Glenn *v.* Leith, 22 L. & Eq. 489, is a good illustration of the manner of pleading under this practice of averring generally the performance of conditions precedent. That was an action on a building contract, by the builder and against the employer. The declaration averred that the plaintiff had done all to entitle him to have certain things done and money paid. Numerous pleas were interposed, among which were the following, held by the court to be good:

80. PLEA OF CONDITION PRECEDENT TO AN ACTION ON A BUILDING CONTRACT.

And the said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that the said plaintiff ought not to have his said action against him, because he saith that the said work, in said petition mentioned, was not completed in a good and workmanlike manner, to the satisfaction of the said architect, on or before the 15th day of October, A. D. 1851; but on the contrary thereof, the said work, on the said 15th day of October, and from thence more than fourteen days from that period, and from thence up to the commencement of this action was, and still is, wholly incomplete and unfinished, contrary to the said agreement; and this he is ready to make appear.

81. ANOTHER IN SAME CASE.

(*Begin as in last:*) because he saith that all things necessary to entitle the said plaintiff to have the value and amounts in the said first count mentioned, or any of them, ascertained, determined, and fixed by the said architect of the said defendant, and to have the said balance, less ten per cent., paid to him, had not happened at the time of the commencement of this action; but on the contrary thereof, no certificate from the said architect, that the said work, in the said first count mentioned, had been completed to his satisfaction, had been obtained by the said plaintiff at any time before the commencement of this suit; and this he is ready to make appear.

These pleas show what the English practice is; and it is founded in principle and ought to be followed in Ohio. The general form

of averring performance will be resorted to in petitions on policies of insurance, to which so many conditions are necessarily attached. The answer in such cases will necessarily assume somewhat the following form:

82. ANSWER OF NON-PERFORMANCE OF A CONDITION IN A POLICY OF INSURANCE.

(*Follow the above to the word* "because," *then proceed:*) because he saith that, by one of the conditions attached to, and constituting a part of the said policy of insurance, in said petition mentioned, it was provided that all persons insured by this company, and sustaining a loss or damage by fire, are forthwith to give notice thereof to the said company, or its agent, and, as soon after as possible, to deliver in a particular account of such loss or damage, signed with their own hands, and verified by their oath or affirmation; they shall also declare on oath whether any, and what other, insurance has been made on the same property, what was the whole value of the subject insured, what was their interest therein, in what general manner (*as to trade, manufactory, merchandise, or otherwise,*) the building insured, or containing the subject insured, and the several parts thereof, were occupied at the time of the loss, and who were the occupants of such building; and when and how the fire originated, so far as they know or believe, and procure a certificate, under the hand of a magistrate or notary public, (most contiguous to the place of fire and not concerned in the loss, as a creditor or otherwise, or related to the insured as sufferers,) that he is acquainted with the character and circumstances of the person or persons insured, and has made diligent inquiry into the facts set forth in their statement, and knows, or verily believes, that he, she, or they, really, and by misfortune, and without fraud or evil practice, hath or have sustained, by such fire, loss, or damage to the amount therein mentioned; and the said defendant saith that the said plaintiff did not, as soon as he possibly could after the happening of said loss, or within a reasonable time thereafter, make out and deliver in to the said company, or to its agent, a particular account of such loss or damage, in manner and form as is in said condition required, (or, that the said plaintiff did not procure the certificate of a magistrate or notary public to the statement or account of his loss or damage, sustained by the said plaintiff by the said fire, as the said plaintiff was, by the said condition, bound to do, within a reasonable time after the happening

of the said loss or damage, as is in said petition averred;) and this the said defendant is ready to make appear.

C D,
By , his Attorney.

A failure to procure this certificate is a bar to the right to recover; but where the party has once submitted to be examined, that is a compliance with the condition, though he refuse to submit to a second examination. Moore *v.* Protection Insurance Co., 29 Maine, 97. So, an omission to state the true condition of the property may be set up as a defense. Brown *v.* Williams, 28 Maine, 252. The above form will be sufficient to show how such defenses can be set up under the code, and the practice allowed by it, of averring a general performance of all conditions precedent.

So where the petition is for work and materials, it is presumed that an answer would be good, which should set up that the work was done and materials furnished under a special contract, by which certain conditions were provided; and that the plaintiff had not complied with some one of them. This seems to be admitted as good pleading in Glenn *v.* Leith, *supra*. It shows a fact, which, being admitted, defeats the plaintiff's right to recover.

These conditions are as numerous as the contracts that men make; hence it is impossible to give forms for all possible conditions. All that can be done is to furnish the general outline of an answer, which shall illustrate the principle of pleading in such cases, leaving the condition to be inserted and negatived by the pleader, according to the peculiar character of the condition presented in each particular case.

83. AN ACCEPTANCE OF A THIRD PARTY TAKEN.

And now comes the said C D, defendant, and for answer to the petition of the said A B, plaintiff, saith that the said plaintiff ought not to have his said action against him, because he saith that, after the accruing of the cause of action in the said petition mentioned, and before the commencement of this action, to wit, on the day of , A. D. 18 , the said plaintiff made his certain bill of exchange in writing, and directed it to William Bush, and thereby required the said William Bush to pay to the order of the said plaintiff the sum of $, months after date; and the said William Bush then on sight accepted the said bill of exchange, and delivered the said bill of exchange so accepted, to the said plaintiff for and on account of the said sum of $, the debt in the said petition

mentioned; and the said plaintiff then received the said bill of exchange from the said William Bush, for and on such account, and that afterward the said plaintiff indorsed and delivered the said bill of exchange to one W. F. Grey, who then became, and was, before and at the time of the commencement of this action, the holder thereof; and this the said defendant is ready to make appear.

This plea was held a bar to an action for the goods sold and delivered. This was held a conditional payment, though given by a stranger. Belshaw *v.* Bush, 14 Eng. Law & Eq. 269. The case is a very elaborate one, and well worth a perusal. The bill was outstanding in the hands of the plaintiff's indorsee, when the suit was brought. Griffiths *v.* Owens, 13 Mee. & Welsb. 58; James *v.* Williams, 13 Ib. 828. If the bill had been in the hands of the plaintiff, it would have been no bar. Hawley *v.* Foote, 19 Wend. 516; Sard *v.* Rhodes, 1 Mee. & Welsb. 153. Where a note is taken in payment, there it is a bar. The following form is taken from Sard *v.* Rhodes. The action was against the acceptor of a bill drawn by one George Parish. To that the following plea was interposed:

84. NEW SECURITY TAKEN.

And the said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that the said plaintiff ought not to have his said action against him; because he saith that he, the said defendant, was, in accepting said bill of exchange, the surety and accommodation acceptor of the said George Parish; and that, after the said bill of exchange became due, and before the commencement of this suit, the said George Parish made his certain promissory note in writing, and thereby promised to pay to the said plaintiff, or order, the sum of $, in six weeks after date, and then delivered the said note to the said plaintiff, in full satisfaction and discharge of the said bill, and the said cause of action in the said petition mentioned; and the said plaintiff then accepted and received the said note, in full satisfaction and discharge of the said bill of exchange, and the cause of action in said petition mentioned; and this the said defendant is ready to make appear

This plea was held good, notwithstanding a replication that the note had not been paid. It is averred to have been accepted in full satisfaction and discharge of the bill. The plaintiff, therefore, takes it for better or worse. This is not like the case of Kearslake

v. Morgan, 5 Term, 513, where it was admitted that the non-payment of the note when due, there being no laches on the part of the plaintiff, would revive the remedy on the original debt; for there it was averred that the indorsement was for and on account of the original debt. If it had been averred that the note was given for and on account of the bill, it might have been different. Per Parke, B. In the case supposed, the plaintiff must have shown the note to be in his hands, before he could have sued on the original debt. The acceptance of the note of a third person, in satisfaction and discharge, is a bar to an action on the original liability. Frisbie *v.* Larned, 21 Wend. 451; Peter *v.* Beverly, 10 Peters, 534, 568. But a note received to be in full when paid, is not a bar, unless it is paid. 3 Johns. Cas. 71; 1 Dallas, 261; 1 Penn. 375, 381.

85. WANT OF CONSIDERATION TO A NOTE.

And now comes the said C D, defendant, and says that said plaintiff ought not to have his aforesaid action thereof against him, because he saith that one E F, before and at the time of his decease, to wit, on the day of , A. D. 18 , was indebted to the said plaintiff in a certain sum of money, to wit, in the said sum of $, for the price and value of goods by the plaintiff before that time sold and delivered to the said E F, and which sum was due and owing to the said plaintiff at the time of the making of the promissory note in the petition of the said plaintiff mentioned; and that the said plaintiff, after the death of the said E F, and before the making of said promissory note, to wit, on the day of , A. D. 18 , applied to this defendant for payment thereof; whereupon, in compliance with said request, the said defendant, after the death of said E F, for and in respect of the said debt so then remaining due to the said plaintiff as aforesaid, and for no other consideration whatever, then made and delivered the said note to the plaintiff; and the defendant further saith that the said E F died intestate, to wit, on the day of , A. D. 18 , and that at the time of the making and delivery of the said note to the plaintiff as aforesaid, no administration had been granted of the estate and effects of the said E F, nor was there at that time any executor or executrix of the estate and effects of said E F, nor was there at that time any person liable for the said debt so remaining due to the said plaintiff as aforesaid, and said defendant says there never was any consideration for the said note except as aforesaid; and this he is ready to make appear.

A C, Attorney for Defendant.

This plea was held good in the case of Nelson *v.* Serle, 4 M. & W. 795. *Vide* also Jones *v.* Ashburnham, 4 East, 455; Ridout *v* Bristow, 1 Cromp. & J. 231; Popplewell *v.* Wilson, 1 Strange, 264

86. AN ACTION FOR FREIGHT—A BILL GIVEN AND NOT PRESENTED IN TIME.

And now comes the said C D, defendant, and says that said plaintiff ought not to have and maintain his aforesaid action thereof against him, because he saith that as to the said sum of $, one E F, of , in the State of , was the consignee of the said merchandise and goods shipped on the vessel of said plaintiff to the said E F, at , mentioned in the petition of plaintiff; and that on the day of , A. D. 18 , the said E F delivered to the said plaintiff, for and on account of the said freight, and in payment of the said sum of $, and the said plaintiff then accepted, a bill of exchange, dated on the day of , A. D. 18 , drawn by said E F upon S T, of , in , payable ninety days after date thereof, (or, after sight,) and that said plaintiff kept the said bill of exchange for an unreasonable time before it was presented for acceptance to the said S T, the drawee, to wit, from the day of , A. D. 18 , until the day of , A. D. 18 , and that in consequence thereof, S T, who would have paid said bill, if it had been presented for acceptance within a reasonable time, when it became due, was unable to pay it, and the same was dishonored, and remains unpaid; and this the defendant is ready to make appear.

H A T, Attorney for Defendant.

This plea is found in the case of Straker *v.* Graham, 4 M. & W. 721. The bill was drawn in Newfoundland, on August 12, 1837, and presented for acceptance on November 16th following, and became due February 17, 1838. The bill might have been presented, if sent by mail, in about six weeks. The court held that there was an unreasonable delay in presenting it for acceptance. The drawees did not suspend until January 30th. If a party puts a bill, payable after sight, into general circulation, he is no longer responsible for the delay that may occur in presenting it to the drawee; but it is otherwise when the holder retains it in his own possession. Muilman *v.* D'Eguino, 2 H. Bl. 565; Mellish *v.* Rowdon, 9 Bing. 416; 2 M. & Scott, 570; 23 Eng. C. L. This form can easily be varied to suit any case where a bill or note has been given for a precedent debt, and not collected through neglect of

the holder. This action was brought on the original consideration or debt, on the ground that a bill or note not paid does not extinguish the original debt. It does not, if due diligence is used to collect the bill or note.

87. ASSIGNMENT OF THE CLAIM SUED ON.

And now comes the said C D, defendant, and saith that said plaintiff ought not to have and maintain his aforesaid action thereof against him, because he saith that the said plaintiff, for a valuable consideration, assigned, before the commencement of this suit, the claim sued on in this action to certain persons trading under the name of Devas, Routledge & Co., and they then gave notice thereof to this defendant, and required him to pay the amount thereof to them, the said , and said assignment still remains in full force and unrevoked, and this defendant still remains liable to pay the same to the said persons above named as the assignees thereof; and this he is ready to make appear.

W R, Attorney for Defendant.

This form may be found in Jepps *v.* Day, L. R., 1 Q. B. 372, where it was held sufficient. Blackburn, J.: "In this case the plea in effect states that the plaintiff is suing for a debt, which he has for a good consideration assigned to third persons, and that they have given notice of the assignment to the defendant, and that it is still in force. All the cases from Winch *v.* Keely, 1 Term, 619, show that an assignment of a *chose* in action, after notice to the debtor, is perfectly valid in equity, and passes the beneficial interest. The plaintiff has assigned his debt, and is therefore improperly, and in breach of good faith, suing for it." See Jones *v.* Farrell, 1 De G. & J. 218, 219.

88. PUIS DARREIN CONTINUANCE TO THE JURISDICTION.

And now comes the said defendant, and for a further and second answer to said petition, the said defendant saith that this court ought not further to take jurisdiction in this case; because he saith that the said plaintiff is a citizen of the State of New York, and the said defendant is a citizen of the State of Massachusetts; and that on the day of , A. D. 18 , and before answering said action, a petition of said defendant and a bond with sufficient surety were filed for the removal of this action for trial into the Circuit Court of the United States for the District of , according to the statute of the United States and the practice in such case

made and provided; and that notice of the filing of such petition and bond, and that this court would thereafter be moved to grant the prayer of said petition for such removal, on the ground that the plaintiff was a citizen of New York and the defendant a citizen of Massachusetts, and that the matter in dispute exceeded the sum of five hundred dollars, was duly served upon the plaintiff's attorney; and that said motion was made at the special term of this court, and on the day of , A. D. 18 , was granted, and it was thereby ordered that the said security so offered by said defendant be accepted, and that this court proceed no further in this cause, and the same be removed for trial into the Circuit Court of the United States for the District of , and that upon appeal from said order to the Court of this , said order was reversed by said court; and this he is ready to make appear.

W B S, Attorney for Defendant.

This is in substance the answer in the case of Ayres *v.* The Western R. R. Co., 45 N. Y. 260. The court, at general term, reversed the order of removal, and sent the case down for trial. The defendant, the Western Railroad Company, then filed this plea; the court below sustained a demurrer to it, and the case was tried on the merits, and judgment for plaintiff; thereupon the railroad company took the case up to the Court of Appeals, and that court held the answer good, and reversed the judgment, and allowed the case to go to the United States Circuit Court. Such a case may occur again, and this may serve as a form to take the case up.

89. PUIS DARREIN CONTINUANCE.

And now comes the said C D, defendant, and says that the said plaintiff ought not further to prosecute his said action thereof against him; because he saith that since the last continuance of this action, and after the said bill of exchange became due and payable, to wit, on the day of , A. D. 18 , the said W T, (*he was one of the indorsers,*) in the petition mentioned, paid to the said plaintiff, (he, said plaintiff, then being the holder of said bill, and entitled to receive the amount due and payable thereon,) and the plaintiff then accepted and received of and from the said W T, a large sum of money, to wit, the said sum of $, named in said bill of exchange, together with the sum of $, being all the interest then due and payable thereon, in full satisfaction and dis-

charge of the said bill of exchange in said petition mentioned, and of all moneys due and payable on account and in respect thereof; and this he is ready to make appear.

S N, Attorney for Defendant.

This is the form in Goodwin *v.* Cremer (decided June 8, 1852), 16 Eng. L. & Eq. 90; Jones *v.* Broadhurst, 9 C. B. 173; Beaumont *v.* Greathead, 2 C. B. 494; Thame *v.* Boast, 12 Q. B. 808; Bailey *v.* Haines, 15 Q. B. 533; Wollen *v.* Smith, 9 Ad. & El. 505; Gilmore *v.* Carr, 2 Mass. 171; Foster *v.* Buffum, 20 Maine, 124; Farwell *v.* Hilliard, 3 N. H. 318; Turin *v.* Morris, 2 Dallas, 115; Austin *v.* Bemis, 10 Johns. 451; Porter *v.* Ingraham, 10 Mass. 88; Whipple *v.* Newton, 17 Pick. 168. On such a plea, if not denied, the plaintiff is entitled to a judgment for costs up to the time of filing the answer. Where there are several actions pending on the same note or bill, it was held in Whipple *v.* Newton, *supra*, that the cost in all the actions must be paid. In each separate action this plea must be pleaded, and judgment entered for costs in each case. This plea is to the further prosecution of the action. This form may be easily shaped to meet all such defenses. If the bill had been paid before suit against any one on it, he, if sued, could plead that payment in bar, though not made by himself. See the cases as above.

90. PLEA OF PAYMENT OF MONEY INTO COURT.

And now comes the said C D, defendant, by E F, his attorney, (or, in person,) and says, (or, *in case it be pleaded to part only, add*, as to $, being part of the sum in said petition demanded, or as to the residue of the said sum of $,) that the plaintiff ought not further to maintain his action; because the defendant now brings here into court the sum of $, ready to be paid to the plaintiff; and the defendant further saith that there is no more due to the plaintiff on the claim set up in said petition, (or, *in case of sounding in damages,*) that the plaintiff has not sustained damages, (or, *in a case of debt,* that he never was indebted) to a greater amount than the said sum of $, in respect of the cause of action in the petition mentioned; and this he is ready to make appear. Wherefore he prays judgment, if said plaintiff ought further to maintain his action thereof.

W B L, Attorney for Defendant.

This is the form prescribed by the judges in England, and is good under the code. 4 M. & W. 2. If the plaintiff accepts the

offer and takes the money, judgment for costs would follow. If he refuses the sum and claims more, he must reply that said defendant is indebted to, or owes him a larger sum than is stated and tendered in said plea; and the case goes to a jury. If the jury find no more due, the plaintiff must pay the costs of the trial; if more due, then defendant must pay all the costs. This form may be useful occasionally.

91. NOTE OF A THIRD PERSON TAKEN.

And the said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that the said plaintiff ought not to have his said action against him; because he saith that, after the accruing of the said cause of action in the said petition mentioned, and before the commencement of this suit, he, the said plaintiff, was the owner of a certain promissory note for $, given by one , promising to pay to one , or order, the said sum in months after date, and which note was indorsed in blank by the said , and that he then delivered the said note to the said plaintiff, and the said plaintiff accepted the same, in full satisfaction and discharge of the said cause of action in the said petition mentioned; and this he is ready to make appear.

92. HIGHER SECURITY GIVEN.

And the said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that the said plaintiff ought not to be permitted further to have his said action against him; because he saith that, as to the sum of £3,000, parcel of the money in the last said count of the said petition mentioned, heretofore and after the accruing of the cause of action as to the said sum of £3,000, parcel of said sum in said last count mentioned, and before the commencement of this action, to wit, on the day of , A. D. 18 , it was agreed between the said plaintiff and the said defendant, that the said defendant should sign, seal, and, as his act and deed, deliver to the said plaintiff a certain indenture, between the said plaintiff of the one part and the said defendant of the other part, and thereby, amongst other things, covenant and agree with the said plaintiff that he, the said defendant, should and would well and truly pay, or cause to be paid, unto the said plaintiff the said sum of £3,000, in the introductory part of this plea mentioned, at or in the common dining-hall of Lincoln's Inn, in the county of Middlesex, on the day of , A. D. 18 , with

interest thereon from the day of , A. D. 18 ; and the said defendant further saith that, in pursuance of the said agreement, and in performance of his part thereof, he, the said defendant, did, afterward, and before the commencement of this action, and while the said sum of £3,000 was still due and unpaid, as aforesaid, to wit, on the day and year last aforesaid, with the consent and at the request of the said plaintiff, sign, seal, and, as his act and deed, deliver to the said plaintiff such indenture, as aforesaid, and did thereby covenant to pay the said sum of £3,000, with interest thereon as aforesaid, upon and at the day and time, and in the manner as aforesaid agreed upon; and this the said defendant is ready to make appear.

This plea was held good in the case of Rice *v.* Moulton, 2 Eng. L. & Eq. 303. The general rule is that the giving of a higher remedy merges the lower for the debt. The policy of the law is that there shall not exist two remedies in respect to the same demand. So the giving of a negotiable instrument would discharge an open account. Ilsley *v.* Jewett, 2 Metcalf, 168; Scott *v.* Ray, 18 Pick. 360. A negotiable note is a payment of an installment on a mortgage note, and discharges the mortgage to that amount. Fowler *v.* Rush, 21 Pick. 230; French *v.* Price, 24 Ib. 13; Butts *v.* Dean, 2 Metcalf, 76; 5 Mo. 59; 24 Maine, 202.

93. PAYMENT IN MONEY.

And the said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that the said plaintiff ought not to be permitted further to prosecute his said action; because he says that he, the said defendant, did, before the commencement of this suit, to wit, on the day of , A. D. 18 , pay to the said plaintiff the said sum of $, in said petition demanded, together with all interest at that time due thereon; and this he is ready to make appear.

Vide McKyring *v.* Bull, 16 N. Y. 297.

94. PAYMENT OF PART.

And the said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that the said A B ought not to have his said action against him; because he saith that, as to all of said sum of $, except the sum of $, this defendant

does not owe the same, nor any part thereof, to the said plaintiff; and as to the said sum of $, parcel of said sum of $, above demanded, the said defendant saith that, after the said sum of $ became payable, and before the commencement of this action, he paid to the said plaintiff the sum of $, together with all interest due thereon; and this he is ready to make appear.

95. NO SUCH RECORD.

And the said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that the said plaintiff ought not to be permitted further to prosecute his said action against him;* because he saith that there is not any record of the said supposed judgment and recovery, (or, recognizance, *as the case may be*,) in the said petition mentioned, remaining in said Court of Common Pleas, within and for the county of , and State of , as the said plaintiff hath, in his said petition, alleged; and this he prays may be inquired of by the court here.

96. BY BAIL TO THE ACTION.

And the said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that the said plaintiff ought not to be permitted further to prosecute his said action; because he saith that, after the recovery of the said judgment, as in said petition set forth, and before the commencement of this action, there was no writ of *capias ad satisfaciendum* duly sued or prosecuted out of the said Court of , against the said , (*the defendant in the judgment*,) upon the said judgment, and duly returned in the said court; and this he is ready to make manifest.

97. DEATH OF PRINCIPAL.

And the said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that said plaintiff ought not to have his said action against him; because he saith that, after the recovery of the said judgment, in said petition mentioned, and before the return of any writ of *capias ad satisfaciendum* thereupon against the said , (*the principal*,) at the suit of said plaintiff upon said judgment, he, the said , died; and this he is ready to make appear.

98. PAYMENT.

And the said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that said plaintiff ought not to have his said action against him; because he saith that, after the recovery of the said judgment, and before the commencement of this action, to wit, on the day of , A. D. 18 , the said defendant paid and satisfied to the said plaintiff the said sum of $, in form aforesaid recovered; and this he is ready to make appear.

Accord and satisfaction may be pleaded to an action on a judgment. Harper *v.* Graham, 20 Ohio, 105. So also any other defense which, admitting the judgment, shows it to have been satisfied or discharged. The judgment can not be impeached. Ludlow's Heirs *v.* Johnson, 3 Ohio, 541; Silver Lake Bank *v.* Hardin, 5 Ohio, 545; Goodrich *v.* Jenkins, 6 Ohio, 43; Anderson *v.* Anderson, 8 Ohio, 108; Bank of Australasia *v.* Nias, 4 Law & Eq. 252. If there has been no service on the defendant, the judgment is void as against a person in another state. D'Arcy *v.* Ketchum et al., 11 How. U. S. 165. Hence this question may be raised on the plea of *nul tiel record*, notwithstanding the case of Evans *v.* Gustine, 6 Ohio, 117. So a judgment rendered against two, where the record shows a service only on one, is void as to both. Hall *v.* Williams, 6 Pick. 232; Holbrook *v.* Murray et al., 5 Wend. 161; Rangeley *v.* Webster, 11 N. H. 299; 1 Ib. 242; 7 Ib. 257. If the judgment is void, then that question can be raised on an answer of no such record; because the record, when presented, shows no such judgment as is declared on; a void judgment being no judgment. Benton *v.* Burgat, 10 Serg. & R. 242; Hall *v.* Williams, 6 Pick. 232.

Where, however, the record shows a service there, if in fact no service was had, the fact should be set up by plea. Hall *v.* Williams, *supra*. So if a judgment was obtained by fraud, that fact, under the code, may be set up as a defense to an action on the judgment. The fraud or other misconduct, which will bar a suit on a judgment, is such as would have induced a court of equity to grant a perpetual injunction against its collection. In a case where a court of equity would merely grant a new trial, no answer to a judgment can be interposed setting up such facts; the remedy is by an original petition for a new trial. Nothing less than fraud in obtaining the judgment can be set up as a defense

to an action on the judgment—such a fraud as would avoid a contract. Collier *v.* Easton, 2 Mo. 145. Any equitable defense to the original action can not now be ground for vacating or defeating a judgment, since the party was bound to make such defense to the action. Hence nothing can now be pleaded to bar an action on the judgment but what amounts to fraud in obtaining it. *Vide* 2 U. S. Eq. Dig. 125.

The form of such a plea must depend upon the character of the fraud, and the facts constituting the fraud must be stated; a general plea of fraud will not be sufficient. *Vide* 2 W. Law Jour. 297, and cases there cited. *Contra*, Saunders *v.* Stotts, 6 Ohio, 380.

99. FRAUD.

(*Follow* 95 *to**;) because he says that the said judgment, in the petition of the said plaintiff mentioned, was obtained by the said plaintiff against the said defendant by fraud and misrepresentation, in this, to wit, that the said plaintiff, after he had commenced the said action in his said petition mentioned, fraudulently came to this defendant, and, with the purpose of preventing the said defendant from defending said action, told him, the said defendant, that he, the said plaintiff, intended and would dismiss his said action then pending in said Court of , within and for the said county of , and State of , and against this defendant, and that this defendant need not be at the cost or expense of employing counsel to defend said action; that this defendant, in consequence of such representation, and relying upon the same, did not employ counsel to attend to said action, nor did this defendant appear at the term of said court next thereafter held; and this defendant further saith that the said plaintiff, fraudulently and without the knowledge of this defendant, appeared and prosecuted his said action in the absence of this defendant, and fraudulently took the said judgment against this defendant, by the default of this defendant, which default was fraudulently procured by the said plaintiff as aforesaid; and this he is ready to make appear.

100. FRAUD IN OBTAINING CONTRACT.

And the said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that the said plaintiff ought not to have his said action against him; because he saith that the said promissory note in the said petition mentioned was obtained, by the said plaintiff from the said defendant, by fraud and misrep-

resentation, in this, to wit, (*here state the facts connected with the execution of the note, bill, or contract, as for example:*) that the said plaintiff pretended and represented that he was possessed of a certain patent right for an improved churn, and urged the defendant to buy the right to make and vend the same within the county of , and the said plaintiff, to induce the said defendant to buy the said right, then falsely represented that said patent churn was a valuable improvement, and that large sums of money could be made thereby; and the said defendant, relying on said representations, agreed with the said plaintiff to buy of him, for the sum of $, the right to make and vend such patent churns within the said county of , and thereupon the said defendant made and delivered the promissory note aforesaid; and the said defendant avers that the said patent was void for want of novelty, and the said churn, when so made, was of no value, and no improvement whatever on the former method; all which he, the said plaintiff, well knew, when he so falsely and knowingly made such representations and statements, to induce the said defendant to give the said promissory note as aforesaid; and this the said defendant is ready to make appear.

A plea of this character must be wholly dependent on the peculiar facts of each case, so much so that but very little aid can be received from forms, except as a mean of learning the language and literature thereof.

101. FAILURE OF CONSIDERATION.

And the said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that the said plaintiff ought not to have his said action thereof against him; because he saith that the said promissory note in said petition mentioned was given in consideration of a certain horse which he, the said plaintiff, then and there sold and delivered to the said defendant, and for no other consideration whatever; and the said defendant further saith that the said plaintiff had no title to the said horse at the time he so sold and delivered the same, but the said horse was then owned by and was the property of one E F, who afterward claimed and recovered the same from the said defendant; whereby said promissory note was wholly without consideration; and this the said plaintiff is ready to make appear.

102 PLEA BY SURETY.

And the said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that the said plaintiff ought not to have his said action against him; because he saith that the said defendant, without any consideration, and as the mere surety of the said , did sign the said note in the said petition mentioned, of all which the said plaintiff then had notice; and the said defendant further saith that, afterward, and after the said promissory note had become payable, the said plaintiff agreed with the said that, in consideration that the said would pay to the said plaintiff the sum of $, as interest on the amount named in said note for one year, he, the said plaintiff, would extend and delay the payment of the said note for one year from and after the same became payable, and the said defendant saith that the said did pay the said sum of $ to the said plaintiff, and the said plaintiff did receive the same on the agreement aforesaid, and did then and thereby bind himself to extend the time of payment on said note as aforesaid, and did so extend and delay payment thereof; and this the said defendant is ready to make appear.

See Ohio Life and Trust Company *v.* McCague, 18 Ohio, 54; Bank of Steubenville *v.* Carroll's Adm'r, 5 Ib. 207, 214; Same *v.* Hoge et al., 6 Ib. 17; 11 Ib. 444; Canton Bank *v.* Reynolds, 13 Ib. 84. The contract to be binding must be on a consideration. McComb *v.* Kittridge, 14 Ib. 348.

103. ILLEGAL INTEREST IN NOTE.

And the said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that, as to the sum of , parcel of said sum of $, in said petition demanded, the said defendant admits that he owes the said sum of $ to the said plaintiff; but as to the sum of $, the residue of the said sum of $, the said defendant says that the said plaintiff ought not to have his said action thereof against him; because he saith that the said promissory note in the said petition mentioned was given by the said defendant to the said plaintiff for the loan of for years, and no more, and that the said sum of $ was included in said note, as interest on the said sum of $, for the said term of years, at the rate of per cent. per annum; and this he is ready to make appear.

Where payments have been made, it may be necessary to admit the amount due, plead payment of so much, and then, as to the residue, set up the illegal interest; the form then will be, as to so much, admit it due; as to so much, paid; and as to so much, illegal interest, as in the above.

104. ALTERATION OF A BILL OF EXCHANGE.

And the said C D, defendant, now comes, and saith that said plaintiff ought not to have his said action thereof against him; because he saith that, after the said bill, (or, promissory note, etc.,) was drawn and accepted as aforesaid, and after it was completely issued and negotiated by the said defendant, as acceptor as aforesaid, and whilst in the possession of the said , (*the drawer and payee of the bill,*) the plaintiff, without the consent or knowledge of this defendant, willfully altered the said bill in a material part, to wit, (*here set out the alteration,*) and the said alteration was not made in correction of any mistake originally made in framing the said bill, (or, note,) or to further the first intention of the parties thereto, or any of them; and this he is ready to make appear.

W B L, Attorney for Defendant.

This was the plea in the case of Burchfield *v.* Moore, 25 Eng. L & Eq. 123, and was held a good plea. The alteration consisted in adding to the acceptance the words, "payable at the Bull Inn, Aldgate." The court held the alteration material, and that it avoided the bill. This case shows that in the plea the alteration need not be stated—that the averment that it is material is sufficient. The replication in this case set up what the alteration was. Mackintosh *v.* Haydon, Ry. & M. 362; Desbrow *v.* Weatherly, 6 Car. & P. 758; Davidson *v.* Cooper, 13 Mee. & Wels. 343; Cowie *v.* Halsal, 4 B. & Ald. 197; Taylor *v.* Moseley, 6 Car & P. 273; 11 Coke, 26, Pigot's case. The bill is void in the hands of a *bona fide* holder for value. Master *v.* Miller, 4 Term, 320; 2 H. Black. 140. The bill in the main case here was in the hands of an innocent holder; still the alteration made the bill void, and no one could recover on it. The remedy was on the party from whom the bill had been received.

In Farmer *v.* Rand, 14 Maine, 225, one of the indorsers, whose name was on the note, after the defendant had indorsed it, wrote above all the names of the indorsers the following words: "We waive all notice on the promisor and ourselves, and guarantee the payment at all events." This was held to bind all the indorsers, and being writ-

ten there without their knowledge or consent, was a material alteration and rendered the indorsements void. In Buck *v.* Appleton, 14 Maine, 284, a similar question arose. J. W. Appleton, one of the indorsers, and after all the indorsers had made their indorsement, wrote after the name of the first indorsee and payee these words, "*We waive notice.*" The court held that these words applied to all the indorsers whose names were subsequent to these words; that the alteration was a material one and rendered the subsequent indorsements void. Wiston, C. J., in the first case, said: "The authorities are very clear that, if a note, or other instrument, be altered in a material part, without the consent of the party to be affected by it, it is void." Master *v.* Miller, 4 Term, 320; Powell *v.* Divett, 15 East, 29; Hatch *v.* Hatch, 9 Mass. 311; Homer *v.* Wallis, 11 Mass. 309; Cowie *v.* Halsal, 4 B. & Ald. 197; Wheelock *v.* Freeman, 13 Pick. 165; Clawson *v.* Dustin, 2 Southard, 821; Hinchfeld *v.* Smith, L. R., 1 Q. B. 340. Where a promissory note expressed no time for payment, and while in possession of the payee, he added the words "on demand," it was held not to alter the legal effect of the note, and, therefore, did not render it void. The rule in Pigot's case, 11 Reps. 27, n., that an immaterial alteration by the obligee avoids the bond, disapproved of. Davidson *v.* Cooper, 11 M. & W. 778; S. C., 13 M. & W. 343; Langhorn *v.* Cologan, 4 Taunt. 330; Fairlie *v.* Christie, 7 Ib. 416; Colton *v.* Simpson, 8 A. & E. 136; Gardner *v.* Walsh, 5 E. & B. 83; Patterson *v.* McNeely, 16 Ohio St. 348; Page *v.* Morrell, 3 Keys, 117; McCaughey *v.* Smith, 27 N. Y. 39. Where the payee, wishing to negotiate a note signed by S, wrote his name under that of S, held not to release S. Brownell *v.* Winnie, 29 N. Y. 400. Colton *v.* Simpson is overruled in Gardner *v.* Walsh, 5 E. & B. 83; 85 Eng. C. L. 82. This last case holds that the addition of the name of another maker is a material alteration. The removal of any writing under the signature, which was there, when the note was delivered, is an alteration, and if material avoids it. Johnson *v.* Heagan, 23 Maine, 329; Thornton *v.* Appleton, 29 Ib. 298; L. R., 3 Q. B. 379; L. R., 2 Exch. 189; 25 Eng. L. & Eq. 116; 32 Eng. L. & Eq. 162; 75 Eng. C. L. 763; 12 Pick. 399; Huntington *v.* Finch, 3 Ohio St. 445; Merrick *v.* Boury, 4 Ib. 60; Fullerton *v.* Sturges, 4 Ib. 530; Portage County Bank *v.* Lane, 8 Ib. 405; Sturges *v.* Williams, 9 Ib. 443.

The rule in the Ohio cases seems to reject the doctrine that a material alteration by a stranger avoids the agreement, and holds it must be made by one a party to the instrument. Ranney, J., says

that fraud in the interested party lies at the foundation of the rule, and as a punishment for his fraud the law deprives him and all claiming under him of all remedy upon it. 1 Gall. 69; 14 S. & R. 405; 8 Cowen, 71; 1 Watts, 237.

The above form may be objectional; it may be, under our decisions, the words, *or a person whose name is unknown to the said defendant*, should be omitted; and the words constituting the alteration be also inserted.

Rent.

105. NON DEMISIT.

And the said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, says that said plaintiff ought not to have his said action,* because he says that the said plaintiff did not demise to the said defendant the said lands and tenements in the said petition named, with the appurtenances, in manner and form as the said plaintiff hath in his said petition declared against him; and of this he puts himself upon the country.

106. NIL HABUIT.

(*Follow the above to* *;) because he says that the said plaintiff, at the time of the demise aforesaid, in the said petition mentioned, had nothing in the tenements aforesaid, whereof he could make the demise aforesaid; and this he is ready to make appear.

Neither of these pleas are good, where the tenant is in under such circumstances that he is estopped from disputing the plaintiff's title. When he has occupied the premises without being disturbed by a superior title, he must pay. Moore *v.* Beasley, 3 Ohio, 294; 1 A. K. Marsh, 330; 2 Ib. 366; 6 Johns. 34; 3 Fairfield, 478; 5 Watts, 55.

107. NO RENT IN ARREAR.

(*Follow* 105 *to* *;) because he says that, as to the said sum of $, which the said plaintiff by his said petition claims to be to him in arrear of the rent aforesaid, there is nothing thereof in arrear to the said plaintiff, as the said plaintiff in his said petition has averred, and of this he puts himself upon the country.

108. EVICTION.

(*Follow* 105 *to* *;) because he says that the said plaintiff, after the time of making the demise aforesaid, and before any time of pay-

ment of any portion of said rent, to wit, on the day of , A. D. 18 , entered into the tenements aforesaid, with the appurtenances, upon the possession of the said defendant, and him, the said defendant, expelled and ejected therefrom, and him, the said defendant, hath always, from the said day of hitherto, kept out of the possession of the same; and this he is ready to make appear.

If the tenant expressly agrees to pay rent—yet if he be evicted by the lessor, it will be a sufficient reason for not paying. 1 Saund. 204.

109. EVICTION OF PART.

(*Follow* 105 *to* *;) because he says that, after the said demise of the premises in the petition above specified, and before any rent by that demise became due and payable to the said plaintiff, to wit, on the day of , A. D. 18 , the said plaintiff, with force and arms into (*here describe the part from which he has been ejected,*) parcel of the premises aforesaid, with the appurtenances, to the said defendant above, in form aforesaid, demised, in and upon the possession of the said defendant thereof, entered, and him, the said defendant, from his said possession ejected, and him, the said defendant, from thence and until and after the said day of , A. D. 18 , (*the day when rent became due,*) hath kept out; and this he is ready to make appear.

110. ASSIGNMENT OF TERM BY LESSEE.

(*Follow* 105 *to* *; (because he saith that, after the making the said demise in the said petition mentioned, and before any part of the said rent in said petition demanded became due and payable, to wit, on the day of , A. D. 18 , he, the said defendant, by a certain indenture of assignment, by him then made and duly executed, did sell, and assign, and set over to one , all his, the said defendant's, right and title, and term in and to said premises, with the appurtenances; by virtue of which said indenture of assignment, the said afterward, to wit, on the day of , A. D. 18 , entered into said demised premises, with the appurtenances, and became thereof possessed for the residue of said term, then to come in and to said premises; whereof the said plaintiff, on the said day of , A. D. 18 , had notice; and the said defendant further saith that the said plaintiff did accept and receive from the said , as tenant to the said plaintiff, a

large sum of money for the rent aforesaid, in form aforesaid reserved and then made payable, and did then accept the said as his tenant of the said demised premises, with the appurtenances; and this he is ready to make appear.

See forms, 2 Saund. 297. This plea is a good bar, where the action is founded upon the use and occupation of the premises; where the action is on the express contract to pay rent, there the party is bound by his contract, and must pay, if his assignee does not. 1 Saund, 241, 242, n. 5.

111. ASSIGNEE THAT HE ASSIGNED BEFORE RENT DUE.

(*Follow* 105 *to* *;) because he says that, after he, the said defendant, became assignee of the said demised premises, as in said petition mentioned, and before any part of the said rent became due and owing to the said plaintiff, to wit, on the day of , A. D. 18 , he, the said defendant, did assign and set over to one , all his right, title, and term yet to come in and to said premises; by virtue of which the said , afterward, on the day and year last aforesaid, did enter into the said premises and became thereof possessed for the residue of said term then to come therein and unexpired, and this he is ready to make appear.

It is not necessary to aver notice of the assignment. The assignee is only liable for the actual use and occupation, and not on the lease. 1 B. & P. 21; Bac. Abr., Covenant, E. 4. Nor is the assignee of a part of the premises, or a part of the term, liable to the lessor for rent. Fulton et al. *v.* Stuart, 2 Ohio, 215.

112. ASSIGNEE DENYING ASSIGNMENT.

(*Follow* 105 *to* *;) because he saith that all the estate, interest, and term of years then to come and unexpired of the said , (*lessee*,) of and in to the said premises, with the appurtenances, by assignment thereof duly made, did not come to and vest in the said defendant, in manner and form as the said plaintiff hath in said petition alleged, and of this he puts himself upon the country.

113. TENDER ON LAND.

And the said C D, defendant, now comes, and for answer to the petition of the said A B plaintiff, saith that the said plaintiff ought not to have his said action against this defendant for a greater sum

than $; because he saith that he, the said defendant, was present at the said demised dwelling-house and premises, on the said day of , A. D. 18 , being the day on which said sum of $ became due and payable as aforesaid, for a reasonable and long space of time next before the setting of the sun in the same day, the same being a convenient and sufficient time before the setting of the sun on that day for the counting of the money with which the said defendant wished and intended to pay the said rent, and also that he was for a reasonable time after the setting of the sun in the same day, ready there to pay, and offered to pay the said sum of $, to the said plaintiff; but that neither the said plaintiff, nor any one on his behalf, during said time, nor any part thereof, was there ready to receive the same; and the said defendant further saith that he hath always since the said day been, and still is, ready to pay the same to the said plaintiff, and the said defendant now brings the said sum of $, here into court, ready to be paid to the said plaintiff, if he will accept the same; and this he is ready to make appear.

As to the law, see Lessee of Boyd *v.* Talbert, 12 Ohio, 212; 4 Taunt. 549; Bac. Abr., Tender, H. 1; Ib., Condition, P. 4; McCormick *v.* Connell, 6 S. & R. 151; Jackson *v.* Kipp, 3 Wend. 230. If the tender is made to the lessor himself, it is good, though not made on the land, but the plea should be so changed as to show that state of facts. It would otherwise be like an ordinary plea of tender. Hunter *v.* LeConte, 6 Cow. 728.

114. MISCONDUCT OF PLAINTIFF AS BAR TO NOT MARRYING.

And the said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that the said plaintiff ought not to have her said action against him; because he saith that, after the making of the promise in the said petition set forth, and without the connivance or knowledge of the said defendant, the said plaintiff did, on the day of , A. D. 18 , at the residence of , in , have carnal connection with one E F; wherefore the said defendant, as soon as he had knowledge thereof, refused to marry the said plaintiff, as he legally might; and this he is ready to make appear.

If the conduct complained of consists in such acts as lead to the general belief that she has been guilty of fornication, this fact may be given in evidence in mitigation of damages; but is not a bar to

the action. In Boynton *v.* Kellogg, 3 Mass. 189, it was held that the bad character of the plaintiff at the time of the promise might be given in evidence in bar of the action, if unknown at the time to the defendant. Sedgwick on Damages, 386, seems to think such evidence can only go in mitigation. He cites Willard *v.* Hone, 7 Cow. 22; Palmer *v.* Andrews, 7 Wend. 142. Faulkes *v.* Sellway, 3 Espinasse, 236, is in accordance with Boynton *v.* Kellogg, and received the direct approval of Parsons, C. J., in that case. On principle, a woman with a bad character ought not to be permitted to sue a man who has promised to marry her in ignorance of her bad character. If so, such a woman has only to go where she is unknown to obtain such a promise—a promise which never would have been given her with a knowledge of her bad character. Good character is a condition of marriage; a woman who receives such a promise is held to warrant this, and this can only be waived by the defendant himself. If he promises, knowing the existence of a bad character, or if he continues his intercourse after being informed of it, he must be held by his promise, as he has waived all objections on the score of character. Snowman *v.* Wardwell, 32 Maine, 275. So, a bad character acquired after the promise, may be given in evidence in mitigation of damages, unless that character grew out of the misconduct of the defendant himself with the plaintiff. The following will answer as a form where previous bad character is the ground of defense:

115. AVERMENT OF BAD CHARACTER.

(*Begin as in* 114:) because he saith that, at the time of making the promise, mentioned in the said petition, the said plaintiff was generally reported and believed among her neighbors to have been an unchaste woman; of which the said defendant was, at the time of making said promise, wholly ignorant; wherefore, as soon as he was informed thereof, the said defendant refused, etc. (*as in last form.*)

Answers in Tort.

116. GENERAL DENIAL.

And the said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that he is not guilty of the said supposed grievances above, in said petition, laid to his charge, or any, or either of them, or any part thereof, in manner and form as the said plaintiff hath, in said petition, complained against him; and of this the said defendant puts himself upon the country.

117. GENERAL DENIAL BY SEVERAL DEFENDANTS.

And the said C D, E F, G H, and J K, defendants, now come, and for answer to the petition of the said A B, plaintiff, say that they are not, nor is either of them, guilty of the said supposed grievances and wrongs above laid to their charge, or any, or either, or any part thereof, in manner and form as the said plaintiff has thereof complained against them; and of this they put themselves upon the country.

118. ADMISSIONS OF CERTAIN DAMAGES AND DENIAL OF FURTHER LIABILITY.

And the said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that, as to the said first (second and third) count in the petition of said plaintiff mentioned, he confesses the said action of the said plaintiff, as to the said supposed grievances and wrongs in those counts mentioned, and that said plaintiff, by means of committing the said grievances and wrongs, in those counts of the said petition mentioned, hath sustained damage to the amount of $ over and above his costs and charges, by him about his suit in this behalf expended up to the time of filing this answer, and here offers to said plaintiff a judgment for said sum so confessed, with costs up to the time of filing this answer; and the said defendant further saith that as to the other counts in the said petition mentioned, he, the said defendant, is not guilty of the said supposed grievances and wrongs in those counts mentioned, or any, or either of them, or any part thereof, in manner and form as the said plaintiff hath thereof complained against him; and of this he puts himself upon the country.

119. ADMISSION OF CAUSE OF ACTION AND OF DAMAGES TO A SUM SPECIFIED.

And the said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that he, the said defendant, confesses the said cause (or, causes, *if more than one count*,) of action of the said plaintiff, so in his said petition set forth, and that the said plaintiff, by means of the committing of the said grievances and wrongs in his said petition mentioned, hath sustained damages to the amount of $ over and above his costs, in and about his suit now expended; and the said defendant offers that the court here shall render judgment therefor against this defendant, and in favor of the said plaintiff; and the said defendant further saith

that the said plaintiff hath not sustained damage by means of said grievances and wrongs beyond the said sum of $, so as aforesaid confessed; and of this he puts himself upon the country.

120. ANOTHER FORM OF GENERAL DENIAL.

And the said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that he, the said defendant, denies the truth of each and every allegation and averment, by the said plaintiff in his said petition made and alleged, and of each and every part thereof, in manner and form as the said plaintiff hath, in his said petition, complained against him; and of this he puts himself upon the country.

Under these pleas of general denial, the plaintiff will be called upon to prove the averments of his petition, and nothing more. Nor can the defendant, under these pleas, give in evidence any matter of excuse or justification.

In what were actions on the *case*, the defendant can not now give in evidence the statute of limitations, a license, or an adverse enjoyment for over twenty years. All these matters must be specially pleaded.

Trover.—The same is true in regard to facts constituting what was once an action of trover.

Slander.—In slander, nothing can be given in evidence, under a general denial, but what proves the non-existence of the slander or libel. Were the words spoken? and if spoken, were they spoken maliciously? Words may be spoken under such circumstances as not to be maliciously spoken, in the eye of the law. So one may show that the words were spoken or the libel published in good faith, in the discharge of a public or private duty, legal or moral, or in the prosecution of his own rights or interests. Anything said or written by a master concerning the character of a servant, or clerk, etc., who has been in his employment, words used in the course of legal or judicial proceedings, and publications made in the ordinary mode of parliamentary proceedings, petitions to the government, or to the legislature, or to the secretary at war, or other departments of the government, for the redress of any grievance, are privileged communications, and not actionable libels, unless prompted by express malice, and without probable cause for making the charge, whatever it may be. This is matter which comes in issue under a general denial. 4 Phillips' Ev. 251; Wright *v.* Woodgate, 2 Cromp. Mee. & Ros. 573; Child *v.* Affleck, 9 Barn.

& Cress. 406; Hodgson *v.* Scarlett, 1 Barn. & Ald. 247; Fairman *v* Ives, 5 Barn & Ald. 642; White *v.* Nichols et al., 3 How. U. S. 266; Flint *v.* Pike, 4 B. & C. 481.

Circumstances which go to mitigate the damages may be given in evidence, either under a general denial, or on a failure to prove a justification, or on an inquiry of damages on a default. Circumstances tending to create in the mind of the defendant a belief of this charge may be received. Wilson *v.* Apple, 2 Ohio, 270. So the defendant may prove that the plaintiff was under general suspicion of having been guilty of the charge imputed. So also he may give evidence of the *general* bad character of the plaintiff. Dewitt *v.* Greenfield, 5 Ohio, 225. So on a charge of perjury, the defendant can not give in evidence the plaintiff's character for truth and veracity; it must be confined to his *general* character. Ib.; Fisher *v.* Patterson, 14 Ohio, 418. *Vide* also Haywood *v.* Foster, 16 Ohio, 88; McLaughlin *v.* Russell, 17 Ohio, 475; Stearns *v.* Cox, Ib. 590.

Trespass.—Not guilty under the code puts in issue the plaintiff's possession of real estate, and his title to the personal property, and the injury committed by the defendant to the same, and the damage sustained. The right of possession to real estate is directly in issue, and any evidence which shows that the plaintiff was not, at the time of the trespass, entitled to the possession is admissible; because such evidence falsifies the petition, by showing that the defendant did not break the *close* of the plaintiff, as stated in the petition. 4 Phillips' Ev. 191; Argent *v.* Durrant, 8 Term, 403; Butcher *v.* Butcher, 7 Barn. & Cress. 402; Parlaman *v.* Parlaman, 1 Penn. 269. But evidence that the *locus in quo* is a public or priate road is not admissible. Saunders *v.* Wilson, 12 Wend. 338; Babcock *v.* Lamb, 1 Cowen, 238; Speer *v.* Bicknell, 5 Mass. 125; 7 Ib. 385, But all facts which admit the trespass, and seek to justify or discharge it, must be pleaded, as *license*, defects of fences, right of common way, or other easement; that he entered to take implements, or cattle, or in aid of an officer executing process, or to remove a nuisance. 4 Phillips' Ev. 191.

In trespass for taking goods, defendant may prove, under the general issue, that he is entitled to the property. 4 Phillips' Ev. 192.

When it should be pleaded.

A general denial may be interposed, whenever the defendant on the whole case can deny that he is guilty. It is not necessary that every averment should be untrue; it is enough if he is not guilty

as the plaintiff hath declared. Were this not the practice, infinite difficulties must arise. A party in slander could not, in case of privileged communications, make his defense without a special traverse of the malice, and when so specially traversed, his traverse would only amount to a general denial. Nor is the oath any objection to this use of the general denial; because the oath is only to the truth of the plea or answer; and if on any special traverse the defendant would be entitled to a verdict, he will be equally entitled to a verdict on a general traverse, and hence his general denial will be found true.

The plea of general issue will be as above given. *Accord and satisfaction* and *arbitrament and award* can be easily adapted to this form of action from the forms given under pleadings on contract. The only change will be in describing the cause of action. Instead of saying "contract," the form can be varied so as to describe the *grievances and wrongs in said petition described*, and to aver it as a discharge and satisfaction of all damages sustained, by reason of the committing of the said grievances and wrongs.

121. SATISFACTION BY ONE OF TWO JOINT TRESPASSERS, AFTER SUIT BROUGHT.

And now comes the said C D, defendant, and for answer to the petition of the said A B, plaintiff, saith that the said plaintiff ought not further to prosecute his said action; because he says that the said supposed trespasses and wrongs, in said petition mentioned, were committed by this defendant jointly with one , and that after the commencement of this action, and before the filing of this answer, to wit, on the day of , A. D. 18 , it was agreed between the said plaintiff and the said that the said should pay to the said plaintiff, and the said plaintiff should receive, a certain sum, to wit, the sum of $, (*the sum paid,*) in satisfaction and discharge of the said supposed trespasses, and of all damages by the said plaintiff sustained by reason of the committing thereof, and of all costs by the said plaintiff incurred in prosecuting his said action; and the said defendant further saith that the said , in pursuance of said agreement, did then pay to the said plaintiff the said sum of $, and he, the said plaintiff, did then accept the same, in full satisfaction and discharge of the said trespasses, and of all damages and costs as aforesaid; and this he is ready to make appear.

This form can be easily adapted to a satisfaction made by one joint trespasser before suit, or by one who is a party to the suit. Damages against joint trespassers are joint, and a satisfaction by one discharges all, whether so intended or not. The party can not discharge one without discharging all. So a note payable at a future day, given by one joint trespasser, and received by the plaintiff as a satisfaction as to him alone, is yet a discharge of all. Ellis *v.* Bitzer, 2 Ohio, 89; Wright *v.* Lathrop, Ib. 33, and the cases cited in the argument of J. C. Wright.

122. SON ASSAULT DEMESNE.

And the said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that the said plaintiff ought not to have his said action;* because he saith that the said plaintiff, just before the time when the said plaintiff claims that this defendant committed the said supposed assault and battery on him, the said plaintiff, to wit, on the day in said petition named, with force and arms made an assault upon the said defendant, and would then and there have beat and ill-treated the said defendant, if he had not immediately defended himself against the said plaintiff; wherefore he, the said defendant, did then and there defend himself against the said plaintiff, as he lawfully might for the cause aforesaid; and in so doing did commit the said supposed trespasses in the said petition mentioned; and this he is ready to make appear.

In a plea of *son assault demesne*, a *wounding* may be justified in self-defense, in the above form; but when the law *prima facie* only authorizes an arrest, or touching of the person by a *molliter manus imposuit*, if a wounding also be attempted to be justified, the occasion thereof must be *specially* stated, as in the case of an arrest under process; a resistance or attempt to rescue must be stated as in 1 Saund. 296, note 1; 8 Term, 78, 299. In defense of the person, a battery may be justified. 2 Salk. 649; 1 Ld. Raym. 177; 7 Moore, 35; Likes *v.* Van Dyke, 17 Ohio, 454.

In defense of property, the defendant must set forth that the plaintiff was on his land, or was taking his property, that he asked him to leave, that he refused, that he *gently* laid hands on him, that he resisted and assaulted the defendant, and that, defending himself against said plaintiff so assaulting him, he committed the battery and wounding complained of. 8 Term, 78; Comyn's Dig., Pleader, 3 M. 15; Ford *v.* Logan, 2 Marsh. 315; McIlvoy *v.* Coch-

ran, 2 Ib. 276; Robinson *v.* Hawkins, 4 B. Mon. 136; Sampson *v.* Henry, 11 Pick. 379.

123. SAME—ANOTHER FORM.

(*Follow* 122 *to* *;) because he saith that the said plaintiff did unlawfully enter the dwelling-house, (or, close, barn, store, shop, inn, etc., *as the case may be,*) of the said defendant, on the said day of , A. D. 18 , situate in the township of , in the county of , and was then and there unlawfully making a great noise, (or, doing any other act, *as the case may be,*) and that the said defendant, as he lawfully might, requested the said plaintiff to leave his said dwelling-house, (or, close, barn, shop, etc.,) which the said plaintiff then and there neglected and refused to do for an unreasonable length of time, and that thereupon the said defendant gently laid his hands upon the said defendant, to remove him, the said plaintiff, from the dwelling-house, (or, close, shop, barn, store, inn, etc.,) of him, the said defendant, and that thereupon the said plaintiff resisted the said defendant, in so removing the said plaintiff, and then and there made an assault on him, the said defendant, and would then and there have beaten and ill-treated the said defendant, if he had not immediately defended himself against the said plaintiff; wherefore he, the said defendant, did then and there defend himself against the said plaintiff, as he lawfully might, for the cause aforesaid, and in so doing did commit the said supposed trespasses, in said petition mentioned; and this he is ready to make appear.

This form can easily be adapted to all cases of a like character. So where one gently lays hands on one, to preserve the peace, and the party assaults him, he may justify a battery. In such case, the fact that the plaintiff was committing a breach of the peace must be specially stated; as that the said plaintiff was about to assault one , and that, to prevent said assault, the defendant gently laid his hands upon him; or, that he and others were making a great noise in a public place to the disturbance of the peace.

124. SON ASSAULT IN DEFENSE OF SON, ETC.

(*Follow* 122 *to* *;) because he saith that the said plaintiff, just before the committing of the said supposed trespasses in the said petition mentioned, and at the time in said petition named, unlawfully made an assault upon one , he, the said , being the son, (father, wife, daughter, servant, mother, or, master, *as the*

case may be,) of the said defendant, and would then and there have beaten and ill-treated him, the said , if he, the said defendant, had not immediately defended the said , wherefore he, the said defendant, did then and there defend the said , so being the son of the said defendant, and in so doing committed the said supposed trespasses, in the said petition set forth; and this he is ready to make appear.

125. PLAINTIFF REMOVED FROM RAILROAD CAR, BECAUSE HAVING NO TICKET.

And now comes the said C D, defendant, and for answer to the petition of the said A B, plaintiff, saith that the said plaintiff ought not to have his said action against him; because he saith that the said defendant was, before and at the time when the said grievances were committed, the conductor, and had charge of a certain passenger train on the railroad of the R. R. Co., running from to , and that it was one of the rules and regulations of said R. R. Co., that no person should be permitted to be and remain on such train, or in the cars thereof, without having a ticket therefor, duly obtained of the authorized agents and servants of the said R. R. Co.; and the said defendant further saith that the said plaintiff was then on the said train, and in one of the cars thereof, without having a ticket therefor as aforesaid; and that the said defendant then and there requested the said plaintiff to leave the said train and car, which the said plaintiff refused to do; whereupon the said defendant then and there gently laid his hands upon the said plaintiff, and removed him from the said train and car, doing no unnecessary violence, as he lawfully might do; which is the same trespass complained of by the said plaintiff in his said petition; and this the said defendant is ready to make appear.

It has been repeatedly decided that a railroad conductor has the same rights of keeping order or removal as the captain of a vessel, or the keeper of a tavern, etc. This form contains, it is believed, all that is necessary to be inserted in such an answer. It must be varied to suit the facts of the case; as a person may be removed for disorderly conduct, or for not complying with any other reasonable rules of the company.

126. JUSTIFICATION BY CAPTAIN OF VESSEL, FOR DISORDERLY CONDUCT OF PLAINTIFF.

And the said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that the said plaintiff ought not to have his said action thereof against this defendant;* because he saith that, as to the assaulting, beating, and ill-treating the said plaintiff, he, the said defendant, was, at the time of the commission of the said assaulting, beating, and ill-treating, captain of a certain ship or vessel, (or, steamboat,) and that the said plaintiff, with other persons, were passengers on board of said ship or vessel, (or, steamboat,) and that the said plaintiff was then on board of said ship or vessel, making a great noise and disturbance, and fighting with a certain other person, and was striving to beat and wound the said person; wherefore the said plaintiff, for the preservation of the peace, and to preserve due order on said ship or vessel, and to separate the said plaintiff and other person so fighting together, and to prevent the said plaintiff from beating, wounding, and ill-treating such other person, as he would otherwise have done, then, as such captain, gently laid his hands upon the said plaintiff, as he lawfully might, for the cause aforesaid; which are the said assaulting, beating, and ill-treating, whereof the said plaintiff hath, in his said petition, complained against him; and this he is ready to make appear.

This form was held sufficient in Noden *v.* Johnson, 2 Eng. L. & Eq. 201. It was held not necessary to state the name of the person with whom plaintiff was fighting.

127. TO PRESERVE THE PEACE.

(*Proceed as above to* *;) because he says that the said plaintiff and one , at the said time and place where said supposed trespasses are averred to have been committed, were fighting together, and striving with force to beat and wound each other, against the peace; wherefore the said defendant, being then and there present, for the preservation of the public peace, and that the said plaintiff and might not hurt each other, and in order to separate and part them, then and there gently laid his hands upon the said plaintiff, as he lawfully might do for the cause aforesaid; which are the said trespasses whereof the said plaintiff has complained against this defendant; and this he is ready to make appear.

If there was also a wounding, the plea must go further, and show a resistance and an assault on the defendant, as in the form but one preceding. Where the petition charges a wounding, when in fact there was none, the defendant may plead that, as to the wounding, he is not guilty, and as to the assault and battery, that he gently laid his hands on the said plaintiff, to prevent or stop a breach of the peace. *Vide* 3 Chitty Pl. 1071, and notes.

128. CORRECTION OF AN APPRENTICE.

(*Proceed as above to* *;) because he says that, before and at the time of the committing of the said supposed trespasses, in the said plaintiff's petition complained of, the said plaintiff was the apprentice of the said defendant, in his trade and business of a , and then and there behaved and conducted himself contumaciously toward the said defendant, and refused to obey his lawful commands, relating to his duty as such apprentice, whereupon he, the said defendant, then and there moderately corrected him, the said plaintiff, for his said misbehavior; which are the said assaulting and beating, whereof the said plaintiff has in his said petition complained; and this he is ready to make appear.

129. CORRECTION BY A TEACHER.

(*Proceed as above to* *;) because he says that he, the said defendant, at and before the time of the committing of the trespasses in said petition set forth, was the teacher of a school, and that the said plaintiff was a pupil and scholar of the said defendant in his said school; and that the said plaintiff, so being a scholar in said school, did then, in said school, and in school-hours, conduct himself contumaciously, and in a disorderly manner, and contrary to the reasonable requirements of the said defendant, and did then and there refuse to obey the reasonable and lawful commands of the said defendant, relating to his, the said plaintiff's, duty as such scholar; whereupon he, the said defendant, then and there moderately corrected the said plaintiff for such his misbehavior; which are the said trespasses of which the said plaintiff has, in his said petition, complained against this defendant; and this he is ready to make appear.

If there was also a wounding, and this arose from the scholar's making an attack on the teacher, the answer should probably state that the plaintiff resisted the defendant in such moderate correction, and assaulted him, and would have beaten him if he had not

defended himself. Previous forms will show how this ought to be stated.

130. MODERATE CORRECTION OF A SEAMAN.

(*Proceed as above to* *;) because he says that the said defendant, before and at the time of the committing of the trespasses by the said plaintiff in his said petition mentioned, was master of a certain vessel, (or, ship, or, steamboat,) called the , and the said plaintiff was then a mariner, (or, hand,) in and belonging to the said vessel; and the said defendant further says that the said plaintiff, just before the said time of the committing of said trespasses, neglected his duty as such mariner in and on board of said vessel, and behaved and conducted himself in a mutinous, disorderly, and improper manner on board thereof; whereupon the said defendant, as such master of said vessel, for the preservation of discipline and order on board thereof, did then and there moderately chastise and correct the said plaintiff for his said neglect of duty and misconduct; and for the same purpose he, the said defendant, did then and there put the said iron shackles upon the hands of the said plaintiff, and did imprison him for the space of time in said petition mentioned; which are the same supposed trespasses whereof the said plaintiff hath in his said petition complained; and this he is ready to make appear.

131. TURNING PLAINTIFF OUT OF DWELLING-HOUSE.

(*Proceed as above to* *;) because he says that the said defendant, before and at the time of the committing of the said trespasses in the said plaintiff's petition mentioned, was lawfully possessed of a certain dwelling-house, situate and being at , and being so possessed thereof, the said plaintiff, just before the commission of said trespasses, and on the day thereof, was unlawfully in the said dwelling-house, and making a great noise and disturbance therein, and continued therein, making such noise and disturbance, without the license and against the will of this defendant; and thereupon the said defendant then and there requested the said plaintiff to cease making his said noise and disturbance, and to depart from and out of said dwelling-house, which the said plaintiff then wholly refused to do; whereupon the said defendant, in defense of his possession of the said dwelling-house, gently laid his hands upon the said plaintiff, in order to remove, and did then and there remove, the said plaintiff from the said dwelling-house, and in so doing, he committed the said supposed trespasses by the said plaintiff in his said petition mentioned; and this he is ready to make appear.

This form will answer for any case of removal, whether from a shop, store, inn, or other building. In case of an inn, it must be so described. *Vide* 3 Chitty Pl. 1074; Comyn's Dig., Pleader, 3 M. 16; 8 Term, 299, 78; 1 Saund. 78, 80, n. 3.

132. TO PREVENT ENTRY IN A HOUSE.

(*Proceed as above to* *;) because he says that he, the said defendant, before and at the time of the committing the said supposed trespasses in said petition mentioned, was lawfully possessed of a certain dwelling-house, (shop, store, etc.,) situate at , in which he, the said defendant, did then dwell, (*or was engaged in his business, whatever it may be, carried on in said building,*) and that, the said defendant being so possessed thereof, the said plaintiff, just before the committing of the said supposed trespass, with force and arms, and with a strong hand, did attempt and endeavor, forcibly and unlawfully, to break into and enter the said dwelling-house, (or, shop, etc.,) of the said defendant, without the license and against the will of the said defendant, whereupon the said defendant did then and there, in order to preserve the peaceable possession thereof, resist and oppose such entrance of the said plaintiff into his said dwelling-house; and in so doing, did commit the said supposed trespass in said petition complained of; and this he is ready to make appear.

A forcible attempt to enter will justify a battery and wounding. 8 Term, 78. If he does not use force to enter, then the answer will aver notice to plaintiff not to enter, and a request to leave; on refusal, a gentle laying on of hands, and a using of force then to enter. Where the entry is into a close, instead of a building, the form can be easily adapted to such a case. The premises must be specially described, so as to identify them. *Vide* 3 Chitty's Pl. 1075.

133. IMPRISONMENT WITHOUT PROCESS, AGAINST TWO, ONE AN OFFICER.

And now come the said C D and E F, defendants, and for answer to the petition of the said A B, plaintiff, say that the said plaintiff ought not to have his said action against them; because they say that, before and at the time of the committing of the trespasses in said petition mentioned, the said plaintiff, with force and arms, did unlawfully assault the said C D, and did beat and ill-treat him, the said C D, and thereupon the said C D then and

there gave charge of the said plaintiff to the said E F, he, the said E F, then being constable within and for the township of , in the county of , (or, sheriff, marshal, or, police officer, *as the case may be*,) and having had view of the said breach of the peace so committed by said plaintiff as aforesaid, and requested the said E F, peace officer as aforesaid, to take the said plaintiff into his custody and carry him before some justice of the peace in and for the said county of , to answer the premises, and be dealt with according to law; and that the said E F, at the request of the said C D, and the said C D, in the aid and assistance of the said E F, then and there gently laid their hands on the said plaintiff, in order to take, and did then and there take, the said plaintiff into the custody of the said E F, as such officer, and kept and detained him so in custody until the said plaintiff afterward, and as soon as conveniently could be, was carried before one , a justice of the peace within and for the county of , aforesaid, for examination concerning the premises, and to be dealt with according to law, and on that occasion the said plaintiff was necessarily imprisoned, and kept, and detained in custody, for the said space of time in his said petition named, as he lawfully might be, for the cause aforesaid, which are the said supposed trespasses in petition complained of; and this he is ready to make appear.

It seems that it must be averred that the officer saw the commission of the offense; still he may arrest to prevent a felony, or an offense whereof the punishment is confinement in the penitentiary, or capital. 2 Esp. 540; 3 Hawk. Pl. Cr. 174; 1 Esp. 294; 3 Camp. 420. A constable may, without warrant, arrest a breaker of the peace, when it is done in his presence. Taylor *v.* Strong, 3 Wend. 384; Commonwealth *v.* Deacon, 8 S. & R. 47; Mayo *v.* Wilson, 1 N. H. 53; Commonwealth *v.* Hasting, 9 Metcalf, 259. But an arrest for felony may be justified by any person, without warrant, if in fact a felony has been committed. Holley *v.* Mix, 3 Wend. 350; Wrexford *v.* Smith, 2 Root, 171; Phillips *v.* Trull, 11 Johns. 486; Wakely *v.* Harte, 6 Binn. 316.

134. JUSTIFYING IMPRISONMENT ON SUSPICION OF FELONY.

And the said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that the said plaintiff ought not to have his said action against him; because he saith that, before and at the time of the committing the trespasses in

the said petition mentioned, the horse of one W X had been feloniously stolen, taken, and rode away, to wit, on the day of , A. D. 18 , at the county of , and that the said plaintiff, just before, and on the same evening preceding the night in which said felony had been committed, was seen in and around the premises and barn of the said W X, where the said horse then was, and clandestinely examining the same; and that the next morning thereafter, the said plaintiff had left, and gone to parts unknown, and that said horse was stolen the same night, and that it was and had been told to this defendant that said plaintiff had been seen riding the said horse, so as aforesaid feloniously stolen and rode away; wherefore the said defendant, having good and probable cause of suspicion, and greatly suspecting said plaintiff of stealing said horse of the said W X, did gently lay his hands on the said plaintiff, and give him in charge to one E F, who was then and there a constable within and for the county of , and then and there requested the said constable to take said plaintiff into his custody, and convey him before some justice of the peace within and for the said county of , (*county where said horse was stolen,*) to be examined by such justice touching the premises, and to be further dealt with according to law; and the said E F did then and there, at the request of the said defendant, gently lay his hands on the said plaintiff, take him into his custody, and as soon as conveniently could be, the said plaintiff was taken in custody before one , the said then being a justice of the peace within and for the said county of , to be examined touching the premises, and was then and there kept in custody, by order of the said justice of the peace, until the day of , A. D. 18 , when he, the said plaintiff, was examined before the said justice touching the premises, and was then and there discharged from custody, by order of said justice of the peace; by means of which said several premises the said plaintiff was imprisoned for the said time by him in his said petition set forth; and which are the same trespasses in said petition mentioned and complained of; and this he is ready to make appear.

The answer must show the grounds of suspicion, and these should be set forth as they are. 4 Taunt. 34; Wasson *v.* Canfield, 6 Blackf. 406. A private person can not justify an arrest without warrant, unless a *crime* has been committed. An officer may justify acting upon information, though it turn out that no crime has been

committed. Holley *v.* Mix, 3 Wend. 350; Wakely *v.* Harte, 6 Binn, 316; Commonwealth *v.* Deacon, 8 S. & R. 49.

135. ARREST UNDER A WRIT.

And the said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that the said plaintiff ought not to have his said action against him; because he saith that, before and at the time of the committing of the said trespasses in said petition mentioned, he, the said defendant, was a constable within and for the township of , in the county of , and that, being such constable, a certain warrant, issued by one , under his hand and seal, the said then being a justice of the peace within and for the said township of , in the county of , and directed to any constable of said , came into the hands of this defendant to be executed; whereby this defendant, as such constable, was commanded to arrest the said plaintiff, and have him forthwith before said justice, or some other justice of the peace for said county of , there to answer to the charge of having feloniously stolen and carried away the goods and chattels of one , to the value of , (*the writ or warrant must be set out according to its effect*,) and this defendant further saith that, by virtue of the said warrant so issued, he, the said defendant, did arrest the said plaintiff, and had him in his custody until he, as soon as he conveniently could, took the said plaintiff before the said justice of the peace, to answer to the complaint aforesaid, as will appear by his return, duly entered on the said warrant, (or, writ, etc.,) and, in so doing, he committed the trespasses in said plaintiff's petition mentioned; and this he is ready to make appear.

If the party was not examined at once, but was imprisoned on the order of the justice, the plea must set forth the order and mittimus, by virtue of which the imprisonment was continued. The original warrant will not justify an imprisonment after a continuance. This can only be done in virtue of a mittimus issued by the justice for his safe-keeping, until the time to which the case is continued.

This form can easily be made to suit all cases that may arise. If the suit is against the party who made the complaint, or the justice, the answer must set forth the making of the affidavit, as well as the issuing of the warrant; for, in case of a *capias ad satisfaciendum*, all but the officer receiving the writ, and those acting

under him, must show a judgment as well as a writ; nor will the writ justify the clerk or party causing the issuing of an execution. An officer is justified if he have a writ not void on its face. Taylor *v.* Alexander, 6 Ohio, 144.

136. REMOVING GOODS.

And now comes the said C D, defendant, and for answer to the petition of the said A B, plaintiff, saith that the said plaintiff ought not to have his said action against him; because he saith that, before and at the time of the committing of the trespasses in said petition mentioned, he, the said defendant, was lawfully possessed of a certain close, situate at , in the county of , and that the said goods and chattels, in said petition mentioned, were wrongfully in and upon the said close, incumbering the same, and doing damage there to the said defendant; and he, the said defendant, seized and took the said goods and chattels, in said petition named, in the said close, and removed the same to a small and convenient distance, and there left the same for the use of the said plaintiff, doing no unnecessary damage thereto on the occasion of such removal; which are the same supposed trespasses complained of by the said plaintiff in his said petition; and this he is ready to make appear.

Vide form for removing nuisance, 3 Chitty Pl. 1094.

137. KILLING DOGS WORRYING SHEEP.

And the said C D, defendant, now comes, and for answer to the said petition of the said A B, plaintiff, saith that the said plaintiff ought not to have his said action against him; because he saith that, at and before the committing of the said trespasses in said petition mentioned, the said dog of the said plaintiff was found by this defendant running, worrying, and injuring the sheep of him, the said defendant, (*or if the sheep of another, so aver,*) and thereupon the said defendant killed the said dog of the said plaintiff, so found running, worrying, and injuring the said sheep, as he lawfully might; and this he is ready to make appear.

Swan's Stat. 328, sec. 2. It shall be lawful for any person at any time to kill any dog which may be found running, worrying, or injuring sheep. The dog may be killed by *any* person, if so found running sheep, etc., and he may follow him up and kill him at any

time, so he keeps up fresh pursuit. So the statute has in practice been expounded, and so construed in our courts of Common Pleas.

138. REAL ESTATE.

And the said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that the said plaintiff ought not to have his said action against him; because he saith that the said defendant, before and at the time of the commission of the said trespasses in said petition mentioned, was lawfully possessed of a certain garden, (or, close, etc.,) situate at , in the county of , and that the trees and shrubs growing on the close of the said plaintiff next adjoining thereto, grew so near the line of the garden of the said defendant, that the limbs and branches of the said trees and shrubs overhung, and incumbered, and damaged the garden of the said defendant and the vegetables growing therein; wherefore the said defendant did cut, lop, and top the said branches and shrubs, so overhanging and damaging the garden, and vegetables therein, of the said defendant, and took and carried away the said branches, wood, and shrubs, to a small and convenient distance, and there left the same for the said plaintiff; which are the same supposed trespasses whereof the said plaintiff has thereof complained against the said defendant; and this he is ready to make appear.

As to right to abate a private nuisance, *vide* 3 Bla. Com. 5. As to right to cut trees overhanging one's land, see Roll. 394; 3 Bulstr. 198; Vin. Abr., Trees, E., and Nuisance, W. 2; 2 B. & C. 311.

The above form can also be made to apply to a public nuisance. One who suffers a *private* damage from a nuisance, may abate it. The injury must be an existing one. Gates *v.* Blancoe, 2 Dana, 158. He must do no unnecessary injury. Public nuisances may also be abated by individuals. Wetmore *v.* Tracy, 14 Wend. 250; Meeker *v.* Van Rensselaer, 15 Wend. 397; Adams *v.* Beach, 6 Hill, 271.

139. DEFECT OF FENCES.

And the said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that the said plaintiff ought not to have his said action against him; because he saith that he, the said defendant, was lawfully possessed of a certain close, or field, situate in , in said county of , and contiguous to, and next adjoining to, the said close of the said plaint-

iff; and that there was a partition fence between the close of the said defendant and that of the said plaintiff, and that the said plaintiff was bound in law to keep up and in good repair the north half of said fence, and ought to have so kept the said north half of said fence in repair and sufficient; and the said defendant says that the said plaintiff did not keep the said north half of said fence in repair, as he ought to have done, but, on the contrary, suffered the same to become ruinous, fallen down, and out of repair; and that the said defendant had his said cattle, horses, etc., in his said close, as he lawfully might, to depasture the same; and that the said cattle, horses, etc., of the said defendant, without his knowledge or consent, and against his will, escaped through the north half of said fence, by reason of its being so out of repair, into the said close of the said plaintiff; and the said defendant, as soon as he had notice thereof, entered into the said close of the said plaintiff, and drove out of said close the said cattle, horses, etc., into the close of the said defendant, doing as little damage thereby as he could; which are the same trespasses mentioned in the petition of the said plaintiff; and this he is ready to make appear.

Vide 1 Taunt. 529; Comyn's Dig., Pleader, 3 M. 29; 2 Saund. 285, n. 4; 2 B. & C. 311; Swan's Stat. 427, sec. 2; Thayer *v.* Arnold, 4 Metcalf, 589; 11 N. H. 241; 3 Kent Com., 3 ed. 438; 1 Cowen, 79, n.; Rust *v.* Low, 6 Mass. 90; Comyn's Dig., Droit, M. 2. The plea is only available, when plaintiff is bound to keep the fence in repair. This may arise from contract, prescription, etc.

140. RIGHT OF WAY TO TRESPASS.

And now comes the said C D, defendant, and says that said plaintiff ought not to have and maintain his aforesaid action thereof against him; because he saith that one was the owner in fee of certain land, situate at , in the county of , and described as follows, to wit, (*here describe land so as to identify it,*) and, as such owner of said premises, was entitled by immemorial uses to a right of way over the said premises of said plaintiff, mentioned in his said petition, and where said pretended trespass is alleged to have been committed, to pass and repass, on foot, and with wagons, carts, and horses, from his said land to a public highway, across the premises of said plaintiff, for the more convenient occupation of the said premises of said , and that before the commission of the pretended trespass alleged in said petition, the

said demised said premises, with its appurtenances, to one , and that the defendant, as the servant of the said , the lessee aforesaid, did pass over the premises of said plaintiff, in lawful and due use of the said right of way, with a wagon and team, from the premises of the said , now in the occupation and use of said as lessee, as aforesaid, as he had a lawful right so to do; and that the trespasses alleged in said petition are the so passing over said premises of the plaintiff, as he rightfully might; and this he is ready to make appear.

E H, Attorney for Defendant.

This is the form in the case of Williams *v.* James, L. R., 2 C. B. 577. In this case it was claimed there was an excess of the right, by hauling hay that grew on another lot, adjoining the lot of defendant, to which it was admitted the right of way attached. It was held no excess of user. *Vide* Howell *v.* King, 1 Mod. 190; Lawton *v.* Ward, 1 Ld. Raym. 75; Skull *v.* Glenister, 16 C. B., N. S. 81; Cowling *v.* Higginson, 4 M. & W. 245; Ballard *v.* Dyson, 1 Taunt. 279; Henning *v.* Burnett, 8 Exch. 187; Allan *v.* Gomme, 11 Ad. & El. 759; Dand *v.* Kingscote, 6 M. & W. 174; South. Metrop. R. R. Co. *v.* Eden, 16 C. B. 42.

141. PLEA OF ARREST WITHOUT WARRANT.

And now comes the said C D, defendant, and says that said A B, plaintiff, ought not to have and maintain his aforesaid action thereof against him; because he saith that one E F applied to this defendant, who was then and there a constable for the township of , in said State of , and represented to this defendant that his dwelling-house had been, in the night season of the day of , A. D. 18 , in the county of , forcibly and burglariously broken into, and certain goods and money, of great value, then there being feloniously stolen and carried away, and that one L M, he believed, was the person guilty of said crime, because (*here set out the facts of suspicion that the party accused was the guilty party,*) and that this defendant, honestly and *bona fide* believing, and having such reasonable and probable cause to believe, that said L M was the guilty party in said burglary, did, at the time and place mentioned in said petition, gently lay his hands on the said L M, and did then and there, being such constable, take the said L M into his custody, and safely keep him while complaint could be made against said L M, before some authority lawfully vested with the jurisdiction to inquire into the truth of said charge

so made against the said L M, to be examined by or before such person so lawfully authorized to inquire into said charge, and to be further dealt with according to law; and by means of the said several premises the said L M was imprisoned and detained for the space of hours, the same being a reasonable time for that purpose, and being lawful and just for the cause aforesaid; and this he is ready to make appear.

S N, Attorney for Defendant.

This form is made up from the plea in the case of Wade *v.* Chaffee, 8 R. I. 224; S. C., 5 Am. 572. It was there held that a police officer, or constable, or sheriff, etc., was justifiable in arresting a party charged with having committed a felony, if he has probable cause to believe the party guilty; but that the plea must set forth the grounds of the suspicion, so that the court may judge of them and determine whether they afford probable cause or not. And this arrest may be made without process, even though there may be no reason to fear the escape of such person in consequence of the delay in procuring the warrant. Davis *v.* Russell, 5 Bing. 354; Muse *v.* Kaye, 4 Taunt. 34; Boynton *v.* Tidwell, 19 Texas, 118; Samuel *v.* Payne, 1 Doug. 359; Cowles *v.* Dunbar, 2 Car. & Payne, 565. But the officer must act in good faith, and from probable cause, and not from malice. Beckwith *v.* Philby, 6 Barn. & Cress. 635; Burns *v.* Urben, 40 N. Y. 463. This form can easily be altered to make it fit a case of arrest for any other crime.

142. JUSTIFICATION IN TRESPASS BY A RIGHT OF WAY.

And now comes the said C D, defendant, and says that said plaintiff ought not to have and maintain his aforesaid action thereof against him; because he, said defendant, saith that long before and at the several times when said trespasses are averred to have been committed in said petition mentioned, the said defendant was the lawful occupier of a messuage and divers, to wit, three closes of land, with the appurtenances thereunto respectively belonging, situate at , in said county of , and near to the said close of the plaintiff in the petition mentioned, in which said trespasses are averred to have been committed; and the defendant further saith that he, the defendant, and all the occupiers for the time being of the said messuage and closes of the defendant have, and each of them hath been accustomed to have, use, and enjoy of right, for and during the full period of twenty-one years next before the commencement of this action, a certain way

for himself and themselves, and his and their servants, to go, pass, and repass on foot, and with horses, cattle, oxen, carts, wagons, and other carriages, from and out of a certain common highway in the county aforesaid, toward, unto, into and through, over and along the said close of the said plaintiff in the petition mentioned, and in which close said trespasses mentioned in said petition are averred to have been committed, and from and out of the same toward, unto, and into the said messuage and closes of said defendant, and so from thence back again toward, into, through, over, and along said close of said plaintiff in the petition mentioned, and in which said trespasses in petition mentioned are averred to have been committed, and from and out of the same toward, unto, and into the said common highway, at all times of the year, at the free will and pleasure of said defendant and the said other occupiers for the time being of the said messuages and closes of said defendant, as to the said messuages and closes of said defendant appertaining and belonging. Wherefore the said defendant, at the said several times when said trespasses are averred to have been committed, being the lawful occupier of his said messuages and closes, and having occasion to use the said way, went, passed, and repassed on foot, and with horses, oxen, cattle, carts, wagons, and other carriages, then being loaded with , as in the petition mentioned, in, by, through, and along the said way, from the said common highway, toward, unto, into, through, over, and along said close of plaintiff in the petition mentioned, and in which the said trespasses are averred by said plaintiff to have been committed, toward, into, and unto the said messuage and closes of the defendant, and so from thence back again, in, through, by, and along the said way unto and into the said common highway, as he lawfully might for the cause aforesaid; and in so doing, doing as little damage therein to said plaintiff as on those occasions he possibly could; which is the same trespasses in the petition of said plaintiff mentioned and complained of against this defendant; and this he is ready to make appear.

H B, Attorney for Defendant.

This plea may be found in the report of the case of Colchester *v.* Roberts, 4 Mees. & Wels. 769. To this plea it was replied that this use of the way was by license of the plaintiff. The case presents a nice question between a use for one purpose and a license for another. Cases cited on the argument were: Jackson *v.* Stacey,

Holt's N. P. C. 455; S. C., 3 Eng. C. L.; Cowling *v.* Higginson, 4 M. & W. 245; Simpson *v.* Lewthwaite, 3 B. & Adol. 226; Barnes *v.* Hunt, 11 East, 451.

143. PAYMENT PUIS DARREIN CONTINUANCE.

And now comes the said C D, the defendant, and says that said plaintiff ought not further to prosecute his said action thereof against him for the said sum so demanded, and all interest and damages for the non-payment thereof; because he saith that the goods mentioned in said petition, and the price of which is sought to be recovered in this action, were warranted by the said plaintiff at the time of said sale to be of good and sound quality, and the account was stated in respect of said goods, and when the goods were delivered to the said defendant, he then discovered, as was the fact as he avers, that they were not of good and sound quality, and did not correspond with said warranty, and thereupon, and before the commencement of this action, disputes arose between said plaintiff and defendant in respect to the alleged breach of warranty on the part of the plaintiff; and after the commencement of this action, and after the last pleading in it, it was agreed between said plaintiff and defendant that this defendant should pay to the said plaintiff, and said plaintiff should accept and receive from the defendant, the sum of $, in settlement of the debt sought to be recovered by the plaintiff in this action, together with all interest and damages for the detention thereof, and thereupon the said defendant paid to the said plaintiff the said sum of $, and said plaintiff received the same in satisfaction and discharge of said debt so demanded in said petition, and of all interest and damages due for the detention thereof; and this he is ready to make appear.

S N, Attorney for Defendant.

This plea was held good in the case of Ash *v.* Pauppeville, L. R., 3 Q. B. 86. The plea was held bad as pleaded, because it did not aver that said sum was in satisfaction of damages, as well as of the debt. That averment is inserted here, though, under our practice, there would seem to be no need of it, as, under our practice, interest is the only recovery that can be had in addition to the debt. There are no damages under our practice. The plea is that the amount sued for was compromised for a particular sum; this, of course, included the whole claim—principal and interest. The

demand for damages under the English practice is merely technical, as the damages are only the interest allowed by law.

There is, it will be seen, a consideration for this compromise or settlement, and that consideration is the dispute as to the warranty and its failure in the character of the goods. Hence, it is not a case where a less sum is agreed to be received in discharge of a larger one; though since the decision in Harper *v.* Graham, 20 Ohio, 105, there would not seem to be much left of that rule.

Counsel in this case of Ash *v.* Pouppeville say that no doubt a plea of payment of a smaller sum in satisfaction of a larger, with an agreement to pay costs, would be good, and cite Cooper *v.* Parker, 15 C. B. 822; but this plea is a plea to the further maintenance of the action, and alleges the payment and acceptance of a smaller sum in satisfaction of the debt only; and it leaves unanswered the plaintiff's claim for damages and costs. Lush, J.: "Costs are the only real part of damages in such a case. Do not the rules under the common law procedure (1852) enable the plaintiffs to get their costs?" Counsel: "Possibly that may be an answer as to the costs; but the plea leaves the damages unanswered." Lush, J.: "A plea of payment of £100, to the further maintenance of the action as to the £100, would be good, and the plaintiffs can sign judgment for nominal damages and the costs; it is a mere technical objection as to the mode of pleading." Lush, J.: "Mr. Cole has convinced me that my first impression, which certainly was very strong, was erroneous, and that the plea is defective in not saying that the payment was made in satisfaction of the damages as well as of the debt. It is a case, however, for amendment, and the defendant may have leave to amend." The plea was amended so as to be what it is above. The plea is a plea to the further prosecution of the action for the debt, interest, and damages; and leaves the plaintiff to take a judgment for costs. If the compromise includes the costs of the action in the sum paid, then the answer may be to the whole action, and the words, "for the said sum so demanded and all interest and damages for the non-payment thereof," be omitted, because there can be in such a case no judgment for costs.

This case shows how a case is to be entered when settled. If the defendant is compelled to plead the settlement *puis darrein continuance*, judgment for costs will be rendered against him. This of course only applies when the settlement fails to provide for the disposition of the costs. And there is another qualification probably to be made. If, in the settlement, the defendant pays, or is

to pay plaintiff anything, the plaintiff is entitled to costs, as though he had obtained a judgment for that sum on a verdict; but if the plaintiff is to pay the defendant any amount, then the defendant is entitled to costs. If, then, a case originating in the Common Pleas is settled for a sum less than $100, the plaintiff would not, in absence of an agreement, be entitled to costs. The agreement takes the place of a verdict of a jury as to the amount due plaintiff or defendant, and hence costs should be given or not given, as in case the jury had found a verdict for that amount. This of course only applies where the agreement of settlement makes no provision for costs. The agreement of the parties in that respect must prevail, and constitute and govern the judgment to be entered.

As to costs on an award, see Dunhill *v.* Ford, L. R., 3 C. B. 36. In this case the action was referred, costs to abide the award. There were claims on both sides, but the arbitrators found the largest amount in favor of the defendant; held, defendant was entitled to costs. *Vide* also Boodle *v.* Davies, 3 Ad. & El. 200.

144. ANSWER TO BREACH OF PROMISE TO MARRY—TOO UNWELL.

And now comes the said defendant, and says that said plaintiff ought not to have and maintain her aforesaid action thereof against him; because he saith that after the making of said agreement mentioned in the plaintiff's petition, and before any breach thereof had occurred, the said defendant, without fault on his part, became, was, and still is affected with dangerous bodily disease, which has occasioned frequent and severe bleeding from the lungs, whereby said defendant has become greatly weakened and reduced in rigor and force of body, and in danger of his life from said disease, and from thenceforth hitherto has been and still is incapable of and unfitted for marriage, without great and immediate danger of his life; and said defendant further avers that, having ascertained his said condition, he notified said plaintiff thereof and informed her that out of regard to the continuance of his life he could not enter into marriage with her in his present condition of body without immediate and imminent danger to his life, and hence is unfit for marriage; and this he is ready to make appear.

A B, Attorney for Defendant.

A similar plea was under consideration in the case of Hall *v.* Wright, Ellis, Blackburn & Ellis, 746; S. C., 96 Eng. C. L. 745.

The Court of Queen's Bench was equally divided on the plea as there presented, and because there was no proof of notice of the fact to plaintiff before suit. Campbell, C. J., and Compton, J., were against the plea, and Wightman, J., and Erle, J., for it. In the Exchequer Chamber, Williams, J., Martin, B., Crowder, J., and Willis, J., were against the plea, and Pollock, C. B., Bramwell, B., and Watson, B., in favor of its validity. In the various opinions the whole subject is thoroughly discussed, and in my opinion the reason of the matter is with those holding the validity of the plea. Suppose a party under a promise to marry, and he is struck with paralysis, is it possible that the party would not be discharged from his promise? Would he be compelled to submit to the mockery of a marriage, or submit to be sued in an action for a breach of promise? This contract has conditions attached to it; it is not like other contracts. There death does not vacate the contract; his executor or administrator is bound to execute it, or his estate is liable for damages. But it is a condition of this contract that the death of either party puts an end to it. Can, therefore, a man or woman be compelled to marry, when such marriage would endanger the life of either of the parties? The French law, according to Pothier, admitted ill-health to a certain degree to avoid the contract. There are cases of bodily disease and moral disease. There is no doubt that intellectual disease would also avoid it, as the marriage would be null if the mind was unsound. "The principle," says Erle, J., "to be deduced from these cases, seems to me to be that a contract to marry is assumed in law to be made for the purpose of mutual comfort, and is avoided, if, by the act of God or the opposite party, circumstances are so changed as to make intense misery, instead of mutual comfort, the probable result of performing the contract." This contract of marriage is founded on reasons of public policy, and these reasons declare the contract at an end whenever circumstances occur after it has been made, which render the party unfit, morally or bodily, to enter into it. The French law has reason and policy in its favor, and it is only by conforming this contract to ordinary contracts that such a decision can be sustained. It is admitted that the death of either party, unchastity in the woman, and impotency, are reasons for excusing its execution. Is not such a state of bodily health as to endanger life by entering into marriage an equally valid reason? I think that it is. Pollock, C. B., says: "I think if the man can say with truth, 'by the visitation of Providence I am not capable of marriage,' he can not be called upon to

marry. And I think this is an implied condition of all agreements to marry. I think that a view of the law which puts a contract of marriage on the same footing as a bargain for a horse, or a bale of goods, is not in accordance with the general feelings of mankind, and is supported by no authority."

145. LICENSE.

And the said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that the said plaintiff ought not to have his said action against him; because he saith that he, the said defendant, at the time of committing said trespasses, so by the said plaintiff in his said petition complained of, by the leave and license of the said plaintiff, to him for that purpose first given and granted, committed the said supposed trespasses in the said petition mentioned; and this he is ready to make appear.

Vide 8 East, 308; 4 M. & S. 562; 1 B. & C. 634; 2 Term, 166; 7 Taunt. 156. A license is not assignable. Pease *v.* Gibson, 6 Greenl. 81; Emerson *v.* Fisk, 6 Ib. 200; Prince *v.* Case, 10 Conn. 375; Woodbury *v.* Parshly, 7 N. H. 237. A license to build a dam on one's land, or an end of it, for benefit of both, is not revocable after execution. Ib.; 13 Vt. 150; Luce *v.* Carley, 24 Wend. 451; Gardner *v.* Rowland, 2 Iredell, 247.

146. RIGHT OF WAY.

And the said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that the said plaintiff ought not to have his said action against him; because he saith that, before and at the time of the committing of the said trespasses in the said petition mentioned, there was, and of right ought to have been, a common and public highway into, through, and over the said close of the said plaintiff in his said petition described, and along which all citizens and travelers had a right to pass, with their carriages, teams, and on foot, at all times, of their own free will; and that the said defendant, with his said horses, etc., did thereupon pass over and along said close, in, by, and along the said highway, using the same as he lawfully might, doing no unnecessary damage to the premises and close of the said plaintiff; and because the said fence, stakes, gates, etc., had been wrongfully erected, and were standing on said highway, and obstructing the same to the great inconvenience and hinderance of the lawful travel over the said public highway, he, the said defendant, did

remove, dig up, and pull down said obstructions, and carried the same to a small and convenient distance, and there left the same for the use of the said plaintiff, doing no unnecessary injury thereto; which are the same supposed trespasses, by the said plaintiff, in his said petition, complained of; and this he is ready to make appear.

147. ROAD FOUNDEROUS, AND DEFENDANT WENT ON PLAINTIFF'S LAND.

And the said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that the said plaintiff ought not to have his said action against him; because he saith that, before and at the time of committing the said supposed trespass by the said plaintiff in his said petition named, there was a common public highway, passing along and next adjoining to the said close of the said plaintiff; and that the said public highway, so passing next adjoining said close of the said plaintiff, was then so miry, deep, founderous, and out of repair, that it was impossible for the public to pass over and along said road with their carriages, wagons, and carts; and that the said defendant having occasion to pass along and over said road with his said wagon and horses, and being unable to do the same, by reason of the said highway being so miry and founderous, did take down the fence of the close of the said plaintiff, in a convenient and proper place, and with his said horses and wagon, did pass over the said close of the said plaintiff, and around the said founderous and miry part of said highway, and returned again, with his said wagon and horses, into said public highway as soon as he, the said defendant, conveniently could, he, the said defendant, doing no unnecessary damage, in so going over the close of the said plaintiff; which are the said supposed trespasses so complained of by said plaintiff in his said petition; and this he is ready to make appear.

A man may justify going over adjoining ground of another, by reason that the common highway is founderous and impassable. Fulton *v.* Monahan, 4 Ohio, 426.

148. ENJOYMENT OF RIGHT OF FLOWAGE FOR TWENTY-ONE YEARS.

And the said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that the said plaintiff ought not to have his said action against him; because he saith that the

said defendant is possessed of a certain close, situate at , in , with a grist-mill (or, saw-mill, or, paper-mill,) and a dam thereon and across the said creek, below the close of the said plaintiff; and the said defendant further saith that he, and those under whom he claims to hold said close, mill, and dam, did, more than twenty-one years before the commencement of this action, build the said dam across said creek to the height of ten feet, and have ever since and continuously kept the same up to that height, and during all that time have flowed the water of said creek back upon the premises of the said plaintiff, as the said plaintiff hath in his said petition thereof complained against this defendant; and this he is ready to make appear.

Under the old practice, the plea in such a case must set forth a grant which has been lost, and justify under that. The code, however, is against all fictions in pleading. Hence such a defense must be made in this form, or it can not be made at all. It sets up the fact of an adverse possession for over twenty-one years; this is in law a bar to the right to sue; the defendant has a right to flow the water, as he has done for twenty-one years. See another form under the head of Limitation.

149. ENTRY TO RETAKE PROPERTY DETAINED BY PLAINTIFF.

And the said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that the said plaintiff ought not to be permitted further to prosecute his said action; because he saith that the said defendant, long before the time of the committing of said supposed trespasses, was possessed of a gelding, (or, *if mentioned in petition*, of said gelding,) as his own property, and that the said plaintiff did then with force take the said gelding from the possession of the said defendant, and put the same into the said close, and wrongfully detain him therein, and that this defendant, in his own right, (and the said , *if more than one defendant*, as his servant, and by his command,) broke and entered into the said close of the said plaintiff, in order to retake the said gelding, and did then and there retake the said gelding, and lead him away as he lawfully might, for the cause aforesaid; and this he is ready to make appear.

As to right to enter this for this purpose, see 3 Bla. Com. 4; Comyn's Dig., Pleader, 3 M. 39; 8 Term, 78.

150. JUSTIFICATION UNDER LEGAL PROCESS.

No forms are here given, since they are seldom needed. They will be found in 3 Chitty Pl. 1130, and the form given to justify an arrest will serve for a guide, and the answer must in all cases set out the issue of the writ, and the doings of the officer under it. If the plaintiff in the execution is sued, he must set forth a judgment, execution, and levy under it.

151. JUSTIFICATION IN SLANDER FOR LARCENY.

And the said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that the said plaintiff ought not to have his said action against him; because he saith that the said plaintiff, at , on the day of , A. D. 18 , feloniously did steal, take, and carry away, (*here state the property stolen, as in an indictment,*) of the value of $, the property of the said C D; wherefore the said defendant spoke the words mentioned in the said plaintiff's petition, at the several times and places therein mentioned, as he lawfully might do; and this he is ready to make appear.

The decisions show that the plea must be in this form. 3 Pr. 406; Fry *v.* Bennett, 1 Code N. S. 255; Anibal *v.* Hunter, 6 Pr. 255; Sayles *v.* Woodin, 6 Pr. 84; Porter *v.* McCreedy, 1 Code N. S. 88; Lewis *v.* Kendall, 6 Pr. 59; Buddington *v.* Davis, 6 Pr. 401; 7 Pr. 227; 9 Ib. 282; 10 Ib. 79. The law of pleading in slander is not altered in Ohio by the code. The law still requires that a plea of justification should admit the speaking of the words, and state the facts which constitute the crime or charge made.

152. JUSTIFICATION TO CALLING A WOMAN A WHORE.

And now comes the said C D, defendant, and for answer to the petition of the said A B, and wife, plaintiffs, saith that the said plaintiffs ought not to have their said action against him; because he saith that the said E F did, on the day of , A. D. 18 , while sole and unmarried, have carnal connection with one ; wherefore the said C D spoke the words in the said plaintiff's petition mentioned, as he lawfully might do; and this he is ready to make appear.

This plea was held good in Alcorn *v.* Hooker, 7 Blackf. 58. A replication was interposed in that case, setting up that the connec-

tion had been had long before, and with her present husband; and that, with that exception, she had been virtuous. This replication was held bad, and the plea adjudged good. The court says that a single act of larceny makes a thief, and they can see no difference between the cases in principle, however, hard it may appear. If there is an answer, it is this—that the word *whore* means more than a single act of incontinence; and hence that the averment of a single act does not meet the charge. The plea ought to aver several acts with persons whose names are given, or are averred to be unknown.

153. A SECOND PLEA, CHARGING SEVERAL ACTS.

And the said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that the said plaintiff ought not to have her said action against him; because he saith that the said plaintiff did, on the day of , A. D. 18 , at , have carnal connection with one , and also, on the day of , A. D. 18 , at , have carnal connection with one , and also, on the day of , A. D. 18 , at , have carnal connection with a person whose name is to the said plaintiff unknown; wherefore the said C D spoke the words mentioned in the said plaintiff's petition, as he lawfully might do; and this he is ready to make appear.

Where the charge is that she has had carnal connection with a particular person, the justification must meet that charge. Andrews *v.* Vanduzer, 11 Johns. 38. So strict is this rule that, where the charge was that the plaintiff stole hogs, and the plea set up the stealing of a single hog, the plea was held bad, as not being as broad as the charge. Swan *v.* Rary, 3 Blackf. 298. So where the charge was that the testimony of divers witnesses was returned by the plaintiff, who were not sworn, a plea averring that the plaintiff returned *one* was held bad. Fysh *v.* Thorowgood, Croke Eliz. 623. It will not do to plead a crime of a similar character, although of the same, or even greater enormity; the plea must be to the very charge. Torrey *v.* Field, 10 Vt. 353. This renders a distinction in the charge important. Where it is general, as that a woman is a whore, or unchaste, or that one is a thief, or a perjured man, or a counterfeiter, etc.; in such cases, any act of the kind may be pleaded in bar; but where the charge is *specific*, as that he stole the horse of A, or committed perjury on such a trial, or had connection with a particular individual; in these cases, the plea must

meet that charge, and aver it to be true. It matters not how many larcenies, or forgeries, or acts of incontinency the party may have been guilty of, the defendant can not justify unless he can prove the very one he has charged.

154. JUSTIFICATION IN PERJURY.

And the said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that the said plaintiff ought not to have his said action against him; because he saith that, before the speaking and publishing of the said words, of and concerning the said plaintiff, in the said petition mentioned, (or, in the first count of the said petition mentioned,) to wit, on the day of A, D. 18 , at a Court of Common Pleas, within and for the county of , then begun and holden at the court-house in , in said county, a certain issue before them joined in action pending in said court, wherein one was plaintiff, and one was defendant, came on to be tried in due form of law, and was then and there tried by a jury, (or, by the court,) duly elected and sworn between the parties; and upon such trial of the said issue, the said plaintiff appeared as a witness for and on behalf of the said , the plaintiff in said action, and the said plaintiff was then and there duly sworn and took his corporeal oath before the said court, the said court then and there having competent authority to administer the said oath to the said plaintiff in that behalf; and upon the said trial of the said issue, it then and there became and was material to ascertain the truth of the matters hereafter stated to have been sworn to by the said plaintiff; and the said defendant further saith that the said plaintiff, being so sworn as aforesaid, upon his oath aforesaid, then and there falsely, wickedly, willfully, maliciously, and corruptly, and by his own act and consent, did give evidence, amongst other things, at and upon the said trial, to and before the jurors aforesaid, and to the court aforesaid, that (*here state the evidence in which he committed perjury;*) whereas in truth and in fact, etc., (*here negative the plaintiff's evidence, as in an indictment for perjury;*) and the said plaintiff did thereby, in the said court, at the said term thereof, so holden as aforesaid, upon his said oath, upon the said trial of the said issue, falsely, wickedly, willfully, maliciously, and corruptly commit willful and corrupt perjury; wherefore the said defendant, at the said time (or, several times, *if more than one conversation is set out,*) in the said petition mentioned, spoke and published, of and concerning the said plaintiff, the said several words in the said petition (or, the

first, *or other* count of the said petition,) averred, as he lawfully might do, for the cause aforesaid; and this he is ready to make appear.

A plea of justification of perjury, it is said, must be proved by two witnesses, or what is equivalent. It requires the same evidence as on the trial of an indictment for perjury.

Counter-claim.

The form of a counter-claim is nowhere indicated in the code, and books of precedents afford us no aid in its construction. It must, however, state all the *facts* which are necessary to show that the defendant has such a claim as the code contemplates. It must show a *claim* by the defendant against the plaintiff; and a *claim* is the assertion of a right of action. Hence the answer, setting up a counter-claim, must state such *facts* as show a right of action in the defendant against the plaintiff. The answer must also show that this *claim* arose out of the contract or transaction set forth in the petition, or is connected with the subject of the action. Where a suit is brought for rent due for premises, a trespass to and destruction of personal property on the premises can not be set up by way of counter-claim. Drake *v.* Crockroft, 10 Pr. 377. The first fact, then, to be averred is that the counter-claim is connected with the cause of action set forth in the petition; and secondly, the facts constituting this claim or right of action; and these facts must be stated clearly and fully, so as to show a right of action, and that an issue may be taken on them. For this purpose, the answer becomes a petition, and the facts must be stated as if the defendant was a plaintiff in an action to recover for the cause of action. The answer, therefore, must contain substantially what a petition is required to contain, as to the facts necessary to be stated, and the manner of stating them. The form, therefore, can do little more than indicate the manner in which the answer should be drawn, leaving the pleader to refer to petitions in similar cases as to the statement of the facts. This is all that can be done at present, since no cases have been decided, and no forms passed upon by which one can be guided in preparing forms of this character.

A counter-claim must admit the claim of the plaintiff, since it sets up another claim wherewith to satisfy it. If the facts are such as show that the plaintiff has no right to recover on the claim set forth in his petition, then these facts are new matter constituting a *defense*, and should be pleaded as such, as where a note is

void for fraud in its inception, or for want of consideration, or a failure of consideration; and where there has been a partial failure, or want of consideration, it can not be set up as a counter-claim, unless the facts vest in the defendant a right of action for which he could maintain a separate suit. A partial failure of consideration must be set up as a bar to such a part of the claim, while the balance must be admitted. So where work has been done in an unskillful manner, the plaintiff is entitled to recover only the value of his *labor* to the defendant, the value of the work so unskillfully done. If, however, there is a special contract, on which an action could be sustained, for this deficiency in work and material, by the defendant against the plaintiff, then probably the injury sustained should be claimed by way of counter-claim.

155. COUNTER-CLAIM.

And the said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that the said promissory note, in the said plaintiff's petition mentioned, was given by this defendant to the said plaintiff, in consideration of the sale and delivery of a horse by the said plaintiff to the said defendant, on the said day of , A. D. 18 , (*the date of the note,*) and for no other consideration whatever; and the said defendant further avers that, in consideration that he, the said defendant, would buy the said horse of him, the said plaintiff, for the said sum of $, and give his said note therefor, payable as aforesaid, he, the said plaintiff, did warrant the said horse to be sound, (or, well broken to a carriage, etc.,) and the said defendant did thereupon buy the said horse, and give his said promissory note for the said sum of $, as set forth in the said petition; and the said defendant avers that the said horse was not sound; but, on the contrary, was then affected with a disease, whereof he afterward died, and became wholly lost to the said defendant, to his damage $; and the said defendant prays that the said sum of , his damages so as aforesaid sustained, may be adjudged to be set off against the claim of the said plaintiff, so as aforesaid described in the said petition.

Where the claim is founded upon false representations, made on the sale, the answer must, of course, set forth the false representations as in a petition, and a reference to the petition in such a case is all that is necessary.

Where the petition is for the value of work and materials done and found, the form may be a little changed. After setting forth the introductory part of the answer, it may proceed as follows: That the work and materials, mentioned in the petition of the said plaintiff, were done and provided by the said plaintiff for the said defendants under a special contract, made and entered into by and between the said plaintiff and the said defendant, on the day of , A. D. 18 , whereby the said plaintiff agreed with the said defendant, (*here set forth the agreement, and aver wherein the plaintiff failed to comply therewith, and the damages sustained by reason thereof, just as would be done in case an action was brought on the contract for a breach thereof,*) to build for him, the said defendant, and furnish all materials for the same, a brick store-house, on his lot numbered one hundred, in the city of , of the following dimensions, to wit, forty feet in width, one hundred feet in depth, and three stories high, of the height of nine feet each, and have the same completed and ready to be delivered to the said defendant on or before the 1st day of October next thereafter; and the said defendant avers that the said plaintiff did not complete the said store on the said 1st day of October, but, on the contrary, did not complete the same until the 1st day of January next thereafter; whereby the said defendant was compelled to hire another store, and pay therefor the sum of , and was otherwise greatly damaged in the premises; to the damage of the said defendant, as he saith, $; and he therefore prays that the said sum of $, his damages so as aforesaid sustained, may be applied to satisfy so much of the claim of the said plaintiff; and for any excess over the said claim of said plaintiff, the defendant may have judgment therefor against the said plaintiff.

The *special* damages must be set forth in the answer, as in a petition, and no recovery can be had for these, unless specially set forth.

156. COUNTER-CLAIM ON A COVENANT IN A LEASE TO ERECT NEW FENCES.

And the said C D, defendant, further saith that, by the terms of the lease, in the petition of the said plaintiff mentioned, the said plaintiff covenanted to build all new fences, if any such should be needed, on the premises so leased as aforesaid; and the said defendant saith that new fences were needed around that portion of said premises which lay below the road passing through the said

premises, and that the said plaintiff was, by the said defendant, on the day of , A. D. 18 , notified thereof and requested to make the same, as by his said lease he was bound to do; yet the said plaintiff did not make the said new fences, or any part thereof, but wholly refused and neglected so to do; whereby the said defendant could not enjoy the advantages he otherwise would have derived from the said premises, but was greatly injured in his crops, and cultivation thereof, by the want of said fences, to his damage $; wherefore he prays judgment against the said plaintiff for the sum of $, and that the same may be applied to any judgment the said plaintiff may recover against him, the said defendant, on the cause of action mentioned in the said petition.

157. SET-OFF.

And now comes the said C D, defendant, and for answer to the petition of the said A B, plaintiff, saith that the said A B, at the commencement of this action, was, and still is, indebted to the said defendant in the sum of $, on the several causes of action hereafter stated; to wit, in the sum of $, for the price and value of goods before that time sold and delivered by the said defendant to the said plaintiff, at his request, with interest thereon from the day of , A. D. 18 ; in the sum of $, for money before that time had and received by the said plaintiff to and for the use of the said defendant, with interest thereon from the day of , A. D. 18 ; in the sum of $, for money before that time paid by the said defendant, for the use of the said plaintiff, at his request, with interest thereon from the day of , A. D. 18 ; in the sum of $, for the price and value of work and labor before that time done, and material therefor provided, by the said defendant for the said plaintiff, at his request, with interest thereon from the day of , A. D. 18 ; in the sum of $, for money before that time lent by the said defendant to the said plaintiff, at his request, with interest thereon from the day of , A. D. 18 ; in the sum of $, for money found to be due from the said plaintiff to the said defendant, on an account before that time stated between the said parties, with interest thereon from the day of , A. D. 18 ; in the sum of $, with interest thereon from the day of , A. D. 18 ; on a promissory note, which the said plaintiff before that time, to wit, on the day of , A. D. 18 , (*date of note*,) made and delivered to the said defendant, and thereby promised to pay to the said defendant, or order, the said sum of $, on the day

of , A. D. 18 , (or, in days after the date thereof, or, in one year after the date, *as the case may be;*) and which said sum of money the said plaintiff hath not paid, or any part thereof; in the sum of $, with interest thereon from the day of , A. D. 18 , on a certain bill of exchange, drawn by one E F, on the said plaintiff, on the day of , A. D. 18 , directing the said plaintiff to pay to the order of the said defendant the sum of $, in days after the date thereof, and that the said plaintiff then accepted the same on presentation, which period has now elapsed, yet the said defendant has not paid said sum of money, or any part thereof; and the said defendant prays that so much of the said sum of $ may be set off against any claim which the said plaintiff may have against this defendant, as equals the same, and that the said defendant may have judgment against the said plaintiff for the balance.

Where the set-off goes only to a part of the claim of the plaintiff, the answer must admit the balance, or meet it with some other defense. The answer may be that, as to the sum of $, parcel of the said sum of $, demanded in the petition of the said plaintiff, the defendant saith that the said plaintiff was, and still is, indebted to the said defendant in the said sum of $; and then proceed to state the grounds of indebtedness, as in the above form; and after that the answer may deny that the defendant owes the balance, or aver its payment, etc.

The set-off is a single matter, though composed of several items; and several distinct matters of set-off may be combined in a single statement; so held in New York, 6 Pr. 420. But each item must be stated separately, as in the above form. The set-off must be treated as a petition, and the matters of set-off be stated in a petition, though they need not be numbered under the code, since the whole set-off is but one statement, and that alone must be numbered as one separate matter in the answer.

A set-off can be pleaded only in an action founded on a contract; and the set-off itself must be a cause of action arising on contract, or ascertained by the decision of a court; hence a judgment may be the subject of a set-off. It would seem that any cause of action founded upon a *contract* may become the subject of set-off, even though the sum due sounds in damages, and the amount thereof has to be ascertained by the verdict of a jury, or of the court.

The former statute speaks of *liquidated* demands, as being the

subject of set-off; but the present statute is manifestly broader, and allows unliquidated demands to be made the subject of set-off, so they arise out of, or are founded upon contract. The cause of action to be set off must arise upon contract; this is the simple condition. Hence any cause of action founded on contract may be set up as a set-off to another cause of action arising on contract; it is damages against damages. The jury, therefore, may be compelled to try, in a single action, two distinct causes of action, and both sounding in damages. Whether such a practice will tend to certainty in the administration of the law may well be doubted.

Where the set-off is a cause of action sounding in damages, the answer must be like a petition, and set forth the facts as in a petition, and conclude by an averment of damages, as in a petition; and then pray that the said damages so sustained, or so much thereof as is necessary, may be applied to satisfy any amount which the plaintiff may recover on account of the chose of action set forth in the petition.

It may be doubtful whether a set-off must not be still for a sum certain; that may be called a liquidated sum. A set-off is a well-defined term, allowable on contracts for a sum certain; and if it can be extended further, then it will be broader than counter-claim, which is limited to matter growing out of same transaction; while under head of set-off, all causes of action founded on contract may be set up. On consideration, since the first edition was published, our previous opinion is shaken, if not entirely changed. It is now believed that set-off must be limited as heretofore, where the sum claimed constitutes a *liquidated demand.*

In the case of Arnold *v.* Bainbridge, 24 Eng. L. & Eq. 454, the court held that where to a plea of set-off the plaintiff replies that he is not indebted as in the plea alleged, the plaintiff may show that the claim set off is one due from himself and another, and not from himself alone. Debts can not be made the subject of set-off unless they be mutual and due in the same right. The replication alleges that the plaintiff is not so indebted. And the replication must have the meaning that will make the plea good, and the plea is not good unless the set-off is a debt due from the plaintiff to the defendant.

158. SET-OFF BY ONE DEFENDANT WHO IS PRINCIPAL, AND THE OTHERS SURETIES.

And now comes the said C D, and for answer to said petition saith that he, the said C D, is the principal debtor in the said claim set up by said plaintiff in his said petition, and that the other defendants are his sureties thereon, and have no other interest therein than as such sureties, of all which the said plaintiff had notice; and the said C D saith that said A B plaintiff is individually indebted to this defendant in the sum of $, (*and proceed as in prior form, No.* 144)

Such a set-off has been sustained by our Supreme Court (in a case decided in December, A. D. 1872, and not yet reported. It will appear, I presume, in 22 Ohio St.) Wagner *v.* Stocking, 22 Ohio St. 297.

CHAPTER XXI.

EQUITY FORMS.

PETITIONS.

1. PETITION ON NOTE AND MORTGAGE, FOR PERSONAL JUDGMENT.

The State of Ohio, *County, ss.*, Court of Common Pleas.

A B, plaintiff,
vs.
C D, defendant. } Petition.

The said A B, plaintiff, complains of the said C D, defendant, for that the said C D did, on the day of , A. D. 18 , make his certain promissory note, in writing, of that date, and did then deliver the same to the said plaintiff, and thereby promise to pay to the order of the said plaintiff the sum of dollars and cents, in days after the date thereof, (or, months or years after the date thereof;) and the said plaintiff further saith that, to secure the payment of the said promissory note and the money stated therein, the said C D did, at the time of making said

promissory note, by his deed, duly executed and delivered to the said plaintiff, convey to the said A B, plaintiff, his heirs and assigns, forever, the following real estate, situate in the said county of , and described as follows, to wit, (*here set forth a description of the land included in the deed.*) to have and to hold the same to the said A B, his heirs and assigns, and to his and their own use and behoof, forever; which said deed of conveyance had a condition thereunder written, whereby it was provided that, whereas the said C D had this day executed and delivered to the said A B his promissory note for the sum of $, payable to the order of said A B, in days (or, months, or, years) from date. Now, if the said C D shall truly pay, or cause to be paid, the said sum of $, named in said note, according to the tenor and effect thereof, then this deed is to be null and void, otherwise to remain in full force and effect in law. And the said plaintiff further saith that he caused said mortgage to be deposited with the recorder of said county of , at his office, on the day of , A. D. 18 , at o'clock (P. M. or A. M., *as case may be,*) for record, and the same was thereupon duly recorded in the records of mortgages in said county, and that when said promissory note became due and payable according to the terms thereof, the said C D did not pay said promissory note, or the money named therein, to the said plaintiff, nor any part thereof, nor hath he, said defendant, yet paid the same, nor any part thereof, but that the said sum of money still remains and is due and unpaid, whereby the condition of said mortgage deed has become broken, and said mortgage deed has become absolute.

Wherefore the plaintiff prays judgment against said defendant for said sum of $, with interest thereon from the day of , A. D. 18 ; and also on a failure to pay said judgment by a day to be named, said premises may be ordered to be appraised, advertised, and sold as upon execution, and the proceeds of said sale be applied to pay and satisfy the judgment so to be rendered, or so far as said proceeds shall go in paying the same.

H A T, Attorney for Plaintiff.

Since the last edition of this work, the legislature has interfered in this matter, and by the act of February 19, 1864, has provided that in all actions for the foreclosure of mortgages given to secure the payment of money, or in which a specific lien for money claimed to be due, is sought to be enforced, the plaintiff may also ask in his petition a judgment for the money claimed to be due; and

such proceedings shall be had and judgment rendered thereon, as in other civil actions for the recovery of money only.

It will be seen that the petition on a mortgage is converted into an action at law, and all disputes and issues arising in the case are to be disposed of as in an action at law; hence all issues must be tried by a jury, unless a jury is waived by the parties. A part can not be tried by a jury and a part by the court; the proceedings and judgment rendered thereon shall be had as in other civil actions for the recovery of money only. Hence in these cases, there can be no appeal; there must be a second trial in the Court of Common Pleas. This provision is inserted to avoid the constitutional objection that on the note the party is entitled to a trial by jury.

In framing a petition under this act, the pleader must be prepared to decide if there is any defendant against whom he is entitled to a personal judgment, and which one that is. The assignee or grantee of the mortgagor is not liable to a personal judgment; no one but the person against whom an action at law could be maintained to recover the money secured by the mortgage. Where the mortgagor has conveyed by deed his equity of redemption, he has no further interest in the land, and hence is not a necessary or proper person to be made a party to the action to enforce the mortgage against his grantee. He is liable on his note, or covenant to pay the money, which is secured by the mortgage; but that is a liability, with which legally the land mortgaged has nothing to do. If the mortgagor still retains the legal title, though he may have contracted to sell the mortgaged premises and put the vendee in possession, he has a legal interest in the premises and is a necessary party. The court has decided that the note and mortgage are separate securities for the same debt; the one legal, and the other equitable; the one to be enforced by an action at law, the other by a suit in equity. Fisher *v.* Mosman, 11 Ohio St. 42. And hence that the note may be barred by the statute of limitations, while the remedy in equity under the old statute would run for twenty-one years. The present statute bars an action on both note and mortgage in fifteen years. Such being the law, the plaintiff must own the note secured by the mortgage, and the maker of the note must be a necessary party to the action on the mortgage; hence if he is not a party, no personal judgment can be had against any one; and he can not be made a party for the mere purpose of taking a personal judgment against him. Whether he is a necessary party, must be settled by inquiring whether he has any *interest* in the land;

and he has none, if, by deed, he has conveyed away all his right, title, and interest in the same. Under the old practice, he was no necessary party, and no more can he be under the present statute.

The practice in Kansas may be seen explained in the cases of Young *v.* Thompson, 2 Kan. 83, and the case of Kimball *v.* Connor, 3 Kan. 414.

2. PETITION ON NOTE OR NOTES AND MORTGAGE.

The said A B, plaintiff, complains of the said C D, defendant, for that on the day of , A. D. 18 , the said C D did, by his deed duly executed and delivered, convey to the said A B, his heirs and assigns forever, the following lands and tenements situate in said county of , to wit: (*here describe the lands as they are described in the deed,*) together with the privileges and appurtenances thereunto belonging; and which deed had a condition thereunder written, by which it was provided that in case the said C D, his heirs, executors, administrators or assigns, should pay to the said A B, his executors or administrators, the sum of dollars and cents, with interest, on or before the day , A. D. 18 , (or, certain promissory notes therein described,) to wit: (*here describe the notes as in the deed;*) then said deed should be void, otherwise it was to be and remain in full force and effect in law; and the said plaintiff further saith that said deed was on the same day, at the hour of , duly left with the recorder of said county of for record and duly recorded, (or, that said deed was on the day of , A. D. 18 , at o'clock A. M. (or, P. M.) of said day left with the recorder of said county of for record and duly recorded; and the said A B avers that the said C D did not pay said sum (or, several sums) of money when the same became due as is provided in the condition of said deed, nor has the said C D yet paid the same to the said A B, whereby said deed has become absolute; and the said A B says that there is now due on said notes and mortgage the sum of dollars and cents, with interest from the day of , A. D. 18 .

The said A B, therefore, prays that an account may be taken of the amount due thereon, and that said lands may be sold to satisfy the same, unless C D pay said sum, interest and costs by a day to be named by the court.

In the first edition of this work, the form on a note and mortgage followed the apparent language of the code, and provided for a personal judgment for the money due. It was suggested, how-

ever, that there was grave doubt, whether this could be done for reasons there stated. The Supreme Court, in Ladd *v.* James, 10 Ohio St. 437, has settled this question, holding that a count on the note for a personal judgment could not be joined with a count on the mortgage for a sale of the land. Hence the form for petition on a mortgage is so changed as to make it conform to the decision. I know there are judges and lawyers who dispute as to the effect of this decision, and it is no credit to the court that it has so slurred over the report of its decision as to give room for such dispute. Still the decision means this, or it means nothing. In Hanmond *v.* Deaver, 2 W. Law Month. 591, the same question came under consideration, and was decided on this view of the case of Ladd *v.* James. Peck, S. J., was present, and coincided in that opinion. I have also the admission of another of the judges of the Supreme Court that the case of Hanmond *v.* Deaver is a logical deduction from Ladd *v.* James, and hence was correctly decided. The practice, too, has conformed to this view of the law.

The decree will find the amount due as in the old form in chancery, and order a sale, if that sum and costs are not paid by a day to be named.

The party on a bill to foreclose a mortgage is confined, in his remedy, to the pledge. Such a suit is not intended to act *in personam;* it seems to be generally admitted in the books, that the mortgagee may proceed at law on his bond, or covenant, at the same time that he is prosecuting his mortgage in chancery; and that after foreclosure here, he may sue at law on his bond for the deficiency. Lord Redesdale, 1 Sch. & Lef. 176, and 13 Ves. Jr. 205; Aylet *v.* Hill, Dickens, 551; Took's case, Ib. 785; 2 Bro. 125; Perry *v.* Barker, 13 Ves. Jr. 198; Dashwood *v.* Blythway, 1 Eq. Cas. Abr. 317. It is supposed, in some of the cases, that the subsequent suit at law for the remainder of the debt opens the foreclosure, and revives the equity of redemption. Whether that be so is not now to be discussed; though if the point was before me, I should be much inclined to agree in opinion with Judge Story, in Hatch *v.* White, 2 Gall. 152, that there is no just foundation for the doctrine; and I should especially doubt of its application in the case of a judicial sale under a decree. Per Kent, Chan., Dunkley *v.* Van Buren et al., 3 Johns. Ch. 330; Reedy *v.* Burget, 1 Ohio, 157; Sydam *v.* Bartle, 9 Paige, 294; Vanderkemp *v.* Shelton, 1 Clark Ch. 321; Lansing *v.* Goelat, 9 Cow. 346. This last case decides that a suit on the note at law, to recover a deficiency, does not open the right to redeem the mortgage premises already

sold on a decree. Worthington *v.* Lee, 2 Bland. 678, maintains the same doctrine as Dunkley *v.* Van Buren et al., *supra;* Fleming *v.* Sitton, 1 Dev. & Bat. Ch. 621. A personal decree against the mortgagor, for a balance remaining due, will not be made, except under special circumstances, such as a loss of the bond, etc. Fleming *v.* Sitton, *supra.* The loss of the note gives a court of equity jurisdiction to enforce the collection of the debt. S. P., Hunt *v.* Lewin, 4 Stew. & Port. 138. A decree that the plaintiff have execution for any balance unsatisfied by the sale, is error. The remedy for such balance is at law. Stark *v.* Mercer, 3 How. (Miss.) 377; S. P., Crutchfield *v.* Coke, 6 J. J. Marsh. 89.

All persons interested in the mortgage premises should be made parties, otherwise they will be entitled to redeem, even though the sale was made on the oldest lien. Hughes *v.* Edwards, 9 Wheat. 489; Madeiras *v.* Cattell, 7 Mon. 475; Potter *v.* Crandall, 1 Clark Ch. 119; Renwick *v.* Macomb, Hopk. 277; Reed *v.* Marble, 10 Paige, 409; Haines *v.* Beach, 3 Johns. Ch. 459. Where mortgagee has assigned the debt, the assignee is entitled to foreclose; but the mortgagee is still a necessary party, as he holds the legal title. If, however, he has assigned or indorsed the note, and, by deed duly executed, conveyed his legal title to the land to the assignee, he is no longer a necessary party. Newman *v.* Chapman, 2 Randolph, 92. McGuffey *v.* Finley et al., 20 Ohio, 474, holds that the mortgagee is not a necessary party, even if he has only transferred the debt. Still he has the legal title, and to enable the court to divest him of this, he must be a party. Where the mortgagor has by deed conveyed his equity to another, he need not be a party to an action to foreclose. Bigelow *v.* Bush, 6 Paige Ch. 343. A person claiming adversely to the mortgagor can not be made a party. It is only such as have an interest in and under the mortgagor that are necessary parties. The suit is to extinguish his title. Eagle Fire Co. *v.* Lent, 6 Paige Ch. 635; 8 Ib. 33.

Where a mortgage is given to secure installments falling due, the court can order a sale, on failure to pay the first installment, of a part, and even of all the premises, if they are not susceptible of division, and apply the proceeds to cancel the entire debt. This has been the constant practice in Ohio. All sums may be included in the decree, which are due at the time of its being entered. King and wife *v.* Longworth, 7 Ohio (pt. 2), 231; Lansing *v.* Capron, 1 Johns. Ch. 617; Lyman *v.* Sale, 2 Ib. 487. If the tract can not be divided, the court may order the whole to be sold, and permit the money, on motion, to be applied first to the installments

due, and then to those not due, on principles of equity. King *v.* Longworth, *supra*.

The code does not seem to alter the law of equity in regard to mortgages. It simply requires that land shall be sold (sec. 374); and hence there can be no technical decree of foreclosure. And such was the old rule of the Supreme Court; a sale was always ordered.

The rules of equity still being in full force, it would seem that no judgment for the money ought to be entered, unless the party can have a trial by jury. And where there are numerous parties in interest, the petition must set forth all these interests truly, if known, and if not known, then call on the parties to set them forth. Hence the petition must be a veritable bill in chancery, and can be nothing else. Nor can the code have changed the rule, that the mortgagor is not a necessary party, when he has parted with all his legal and equitable rights in the property. If the maker of the note is a necessary party, in order that a judgment for the money may be rendered against him, it will change very much the practice on this subject, and in equity require an execution first to be issued against him, where he has covenanted with his assignee to pay the debt. In that case, he is in equity the principal debtor, and the land in the hands of the assignee is a mere security.

Where there is no personal obligation to pay the money named in the condition of a mortgage, the mortgagee is restricted to his remedy on the mortgage. The usual condition in a mortgage contains no personal obligation to pay the money; the contract is simply that the mortgagor may pay the sum named, which will revest the title in him; or if he fail to do it, then the deed becomes absolute at law, though in equity he still has a right to redeem, which right to redeem may be cut off by a foreclosure in equity. In such cases the mortgagee is limited to the land for payment, and if that is not sufficient, he has no further security. Drummond *v.* Richards, 2 Munf. 337; 4 Kent Com. 136, 145; 2 West. Law Journal, 216, 222. Hence the petition on such a mortgage must truly state the case, and will omit, of course, all mention of any note or personal liability. The substance of such a petition may be after the following form:

3. PETITION ON MORTGAGE.

The said A B, plaintiff, complains of the said C D, defendant, for that the said C D, defendant, did, on the day of , A. D.

18 , by his deed of that date duly executed and delivered, convey in fee simple, to the said plaintiff, his heirs and assigns, the following lands and tenements situate in the said county of , to wit, (*here describe the lands mortgaged,*) which said deed of mortgage was on the day of , A. D. 18 , duly recorded in the records of mortgages for the said county of ; and the said plaintiff further saith that the said deed had a condition thereunder written, providing that, if the said defendant should, on the day of , A. D. 18 , pay to the said plaintiff the sum of $, with interest thereon, then that the said deed of conveyance should be void and of no effect; but otherwise it was to be and continue in full force and virtue in law; and the said plaintiff further saith that the said defendant did not, nor would pay the said sum of $, with interest thereon, on the said day of , A. D. 18 ; nor hath the said defendant since paid said sum, as aforesaid, or any part thereof, to the said plaintiff.

Wherefore the said plaintiff prays that the said defendant may be decreed and adjudged to pay the said sum of $, with interest thereon from the day of , A. D. 18 , within a short time to be named; or that, in default of such payment, the said lands and tenements may be adjudged to be appraised, advertised, and sold, and the money arising therefrom to be applied in payment of the said sum of $, with interest thereon, as aforesaid.

The judgment or decree in this case will be like the old decree in chancery. It will find the amount due on the mortgage; decree the defendant to pay the same, with costs, within a named period; and in default of such payment, adjudge the land to be sold, and the proceeds to be brought into court, to be applied, on confirmation of the sale, to the payment of the amount thus found due on the sum named in the condition of the deed. When this is done, the mortgagee has exhausted his remedy in equity, and he has no remedy at law, seeing he has neither a note or personal covenant for the payment of the money. The code has not changed the law; it has not enlarged the rights of the mortgagee, and they are limited to his mortgage; and by that, his legal right is to have the land absolutely; his equitable right, to have the land sold, and the money arising from such sale applied to the payment of the sum named in the condition of his mortgage. 2 West. Law Journal, 216, 222; 4 Kent Com. 136, 145; Drummond *v.* Richards, 2 Munf. 337.

If the mortgage has been assigned, the petition must set forth the fact, and make the assignee a party; so, too, if the equity of redemption has been conveyed, both the mortgagor and his grantee must be made parties; the mortgagor as being interested in taking on account of what is due, and the grantee as holding the equity of redemption. The following form will serve to show how the petition should be framed in such a case:

4. ON MORTGAGE OF PERSONAL PROPERTY.

The said A B, plaintiff, complains of the said C D, defendant, (*and any others who have subsequent mortgages or levies on same property,*) for that, heretofore, to wit, on the day of , A. D. 18 , the said C D, being indebted to the said plaintiff in the sum of $, and in order to secure the payment thereof as hereinafter stated, did, by his bill of sale, sell and convey to the said A B, his executors, administrators, and assigns, the following goods and chattels, to wit, (*here describe the articles named in the bill of sale,*) to have and to hold the same to the said A B, his executors, administrators, and assigns forever; which bill of sale had a condition thereunder written, whereby it was provided that, whereas, the said C D was indebted to said A B in the sum of $, as evidenced by his promissory note, dated on the day of , A. D. 18 , whereby the said C D promised to pay to the order of the said A B, the said sum of $, (*with interest, if in note,*) in days (months, or, years, *as the note is,*) from the date thereof. Now, if the said C D shall pay to the said A B the said sum of $, (*with interest thereon,*) according to the tenor and effect of said note, then this bill of sale to be void; otherwise to be and remain in full force and effect in law. And the said plaintiff further says that he indorsed on said bill of sale the said sum of $, as being then justly due and unpaid thereon and secured thereby, and did, on the day of , A. D. 18 , make oath thereto before one , he, said , being then a justice of the peace within and for said county of , and, on the day of , A. D. 18 , said plaintiff did deposit said bill of sale, with the amount justly due and unpaid thereon indorsed thereon and verified by the oath of said plaintiff with the recorder of the county of , (or, with the township clerk of , *as the case may be;*) and the plaintiff further saith that the time for the payment of said sum named in the said condition has elapsed, yet that said C D, though often requested, has not paid said sum of money named in said condition, nor any part thereof,

but that the said sum of $, with the interest thereon, according to the tenor and effect of said note, is still due and payable.

(*If there are other mortgagees, or liens on the same property by levy, such parties must be brought in. In that case proceed as follows:*)

And the said plaintiff further saith that E F, J H, and E W claim to have liens, either by subsequent bills of sale or by levies of executions thereon, and said plaintiff calls on said defendants to set up by answer all and any liens that either, or all of them, may have on said property, and how said liens originated, and the amount, date, and consideration thereof.

Wherefore the plaintiff prays that an account may be taken of the amount due the plaintiff, and any amounts which said defendants or either may claim to be due them, and being a lien on said property, and that said C D may be ordered to pay the plaintiff's demand so to be found due in a time to be fixed by the court, and in default of such payment, that an order issue to the sheriff of this county, commanding him to advertise and sell said property, and apply the proceeds on the several claims so to be found due according to the respective dates of said liens, and for such other and further relief as equity and the nature of the case may require.

D B H, Attorney for Plaintiff.

The law governing mortgages of personal property is pretty well settled. The first mortgage vests the legal title of the property included in it in the first mortgagee; and on a failure to pay, the mortgagee has a legal right to take possession of the same, into whosesoever hands it may have come. But the mortgagor has an equity in any surplus, which he may mortgage to a second mortgagee, who will be entitled to any surplus. Creditors, having judgments, may levy executions thereon, and thereby acquire a lien on the equity of the mortgagor. In order to obtain a sale and distribution, the mortgagee or creditors having liens thereon may, by a petition in equity, force a sale of the property and distribution of the proceeds according to the date of the several liens.

As to description of the property mortgaged.—The principle to be deduced from the cases is that any description, which will enable third persons to identify the property, aided by inquiries, which the mortgage itself indicates and directs, are sufficient. Thus a mortgage of all the stock, tools, and chattels belonging to the mortgagor, in and about the wheelwright-shop occupied by him, is not void as against creditors; and the mortgagee may show, by

parol evidence, what articles were in and about the shop when the mortgage was made. Lawrence *v.* Evants, 7 Ohio St. 194, 196. In the opinion on this point, the following cases are cited, to wit: Harding *v.* Colburn, 12 Met. 333; Morse *v.* Pike, 15 N. H, 529; Burdett *v.* Hunt, 25 Maine, 419; Wolf *v.* Dorr, 24 Ib. 104; Winslow *v.* Merch. Ins. Co., 4 Met. 306. So of an unfinished article, if enough of it is put together to enable one to identify it, that is sufficient. Ib.; Galen *v.* Brown, 22 N. Y. 37; Concklin *v.* Shelley, 28 Ib. 360.

A mortgage of personal property, which leaves the same in the hands of the mortgagor with authority to sell what is on hand and replace the same by new purchases, is void as against other creditors. Freeman *v.* Rawson, 5 Ohio St. 1; Harman *v.* Abbey, 7 Ib. 218. If the power of disposition appear on the face of the mortgage, or is fairly to be inferred from its provisions, it is the duty of the court to declare it void without submitting the matter to the jury. Ib. But, if it does not so appear in the mortgage, a parol agreement to that effect may be shown by parol evidence, and that will avoid the mortgage. A chattel mortgage on the stock in a store, and such as shall be subsequently acquired by mortgagor, is not a lien on after-acquired stock. Chapman *v.* Weimer, 4 Ohio St. 481. It is good for what is there. Gorder *v.* McEwen, 19 N. Y. 123; 28 Ib. 360.

The rights of the mortgagor and mortgagee of personal property is clearly stated by Porter, J., in the case of Hall *v.* Sampson, 35 N. Y. 274, 277. He says: "The execution of the chattel mortgage invested the plaintiff with the title, subject to be defeated by subsequent performance of the condition. The right of possession ordinarily follows that of property, and both would have passed under the transfer, in the absence of any express or implied agreement for the retention of the goods by the mortgagor. It has been held in some of the cases, that no such agreement can be implied from provisions substantially like those contained in the present mortgage. Rich *v.* Milk, 20 Barb. 616; Chadwick *v.* Lamb, 20 Ib. 518. The court below held otherwise, and in their conclusion on this branch of the case we concur. The mortgage specifically defines the circumstances under which the grantee should be entitled to the right of possession; and this evinces the mutual intent of the parties that, until it vested in the mortgagee, it should remain in the mortgagor. His possessory right was to terminate on the failure to pay the debt at the time named, or, at such earlier time as might be fixed by the election of the mortgagee, if in good

faith he should deem himself insecure. On the 29th of June there had been no breach of the condition; and we entertain no doubt that Walpole (the mortgagor) had then an interest in the piano, which justified the defendant in taking it under the attachment. Carpenter *v.* Town, Lalor, 72. But that interest terminated on the 5th of October, when the plaintiff, finding his debt insecure, exercised his right under the mortgage to treat the condition as broken. His act in taking possession of the bulk of the property, was an assertion of his claim and an enforcement of the forfeiture. From that time he had the right of possession, as well as the legal title; and the authority of the sheriff ended, with the interest of the debtor. Galen *v.* Brown, 22 N. Y. 37, 41. The piano was then at the house of Jones, where the defendant subsequently seized it, under his execution in the attachment suit, removed it from the premises, and sold it at public auction; no demand was made by the plaintiff, and none was necessary. The officer had no authority for the seizure and sale of his property. It was the wrongful appropriation of the goods of one to pay the debt of another." The action in this case was an action against the officer for the conversion of the piano, and he was held liable. So where the mortgagor of chattels in possession, after default in the payment of the debt, fraudulently delivered the goods to another, as his own, and got him to sell the same, it was held that the agent, who sold the goods, was personally liable to the mortgagee for their value. Spraights *v.* Hawley, 39 N. Y. 441. The court say that mere possession of personal chattels is not such evidence of ownership, as to protect a *bona fide* purchaser against the real owner. The vendor of personal chattels can give no better title than he has. Woodruff, J., says: "That the authorities seem to me decisive in this case of the principle that the agent, in a tortious conversion of another's property, is liable, when his principal is guilty of the tort; and even though the agent act innocently, in good faith, relying on the possession and apparent authority (if possession be deemed such) of his principal." Perkins *v.* Smith, 1 Wils. 328; Stephens *v.* Elwell, 4 M. & S. 259; McCombie *v.* Davis, 6 East, 358; Baldwin *v.* Cole, 6 Mod. 212; Throop *v.* Bussing, 11 Johns. 285; Farrar *v.* Chauffitch, 5 Denio, 527; Pierson *v.* Graham, 33 Eng. C. L. 468; Everett *v.* Coffin, 6 Wend. 609; Spencer *v.* Blackman, Ib. 167; Williams *v.* Merle, 11 Ib. 80. "And all these cases," continues the judge, "recognize and affirm the more general rule above stated, that he who intermeddles with personal property not his own, must see to it that he is protected by the

authority of one, who is himself, by ownership or otherwise, clothed with the authority he attempts to confer. . . . So long as it is true that a mortgage given in good faith, and for a sufficient consideration, is valid, notwithstanding possession may be in the mortgagor, so long such possession no more involves culpable negligence or *laches* in the mortgagee, than the possession of a servant, hirer, or other bailee, imports negligence in the owner. In truth, so long as mere possession does not impart authority to sell, the negligence, if any, is on the part of him who relies upon it, and not on the owner who permits it." In Mattison *v.* Baucus, 1 N. Y. 295, it was held that no levy could be made when the property was in possession of the mortgagee. The interest of mortgagor is a mere right to redeem. No action will lie on such a mortgage to recover the money named therein, unless there is a covenant to pay contained in it. Culver *v.* Sisson, 3 N. Y. 264. *Vide*, on this point, Briscoe *v.* King, Cro. Jac. 28; Suffield *v.* Baskeroil, 2 Mod. 36; Smith *v.* Stewart, 6 Blackf. 162; Scott *v.* Field, 7 Watts, 360; Drummond *v.* Richards, 2 Munf. 337; Salisbury *v.* Phillips, 10 Johns. 57.

Vide also, on the subject of the mortgage of personal chattels, Hope *v.* Haley, 5 E. & B. 829; S. C., 85 Eng. C. L. 829; Congreve *v.* Evetts, 10 Exch. 298; 3 H. & N. 964; 95 Eng. C. L. 471; 1 C. B. 379; 95 Eng. C. L. 798; Brown *v.* Tanner, L. R., 3 Ch. Ap. 597; Bell *v.* Blyth, L. R., 6 Eq. Cases, 201; L. R., 3 C. B. 38.

In order to keep a chattel mortgage alive as against creditors, it must be filed in the proper office from year to year. The lapse of a full year without such renewal by filing, will at any time render the instrument invalid *as against creditors.* Each refiling places it on the footing of a new mortgage, for the purposes of notice. The year within which any filing must be made, begins to run from the exact time of the preceding filing, and is completed at the corresponding day and hour of the following year. Seaman *v.* Eager, 16 Ohio St. 209. The refiling must be made within the last thirty days of the year; and, if the last day comes on Sunday, the refiling must not be later than the Saturday preceding. The original refiled is a compliance with the statute. 1 S. & C. 474, sec. 4; Payne *v.* Mason, 7 Ohio St. 198. A mortgagee of personal chattels may pay off a prior levy or attachment, and, on a sale, he will be entitled to retain the sum so paid as against liens subsequent to his mortgage. Armstrong *v.* McAlpin, 18 Ohio St. 184. White, J.: "The mortgagees, to obtain possession and protect their title, might purchase prior liens; and, if they did so, and, by the enforcement

of the mortgage, such liens should be technically extinguished, yet, for the money thus expended, a corresponding equity would arise, in their favor, in the property. The latter had the legal title, and were in possession of the fund. The subsequent attachment creditors attached the property, it is true, but the operation of their attachments was limited to the interest of their debtor, which was subordinate to the prior attachments and to the mortgage." In the case of Dillingham *v.* Bolt, 37 N. Y. 198, it was held that, if the mortgagor had left the State, there could be no refiling of it, since it must be refiled in the township where he resided. Our statute, in case of the mortgagor's having left the State, provides for refiling it in the township where it was first filed.

The present statute requires the true amount of the debt to be indorsed on the back of the mortgage, and sworn to by the mortgagee. On each refiling, a new statement of the debt ought to be made and sworn to, though it may not be *absolutely* necessary that it should be sworn to, as the section about refiling only says the copy or original shall be filed together with a statement exhibiting the interest of the mortgagee in the property at that time. This interest is shown by a statement of what is due the mortgagee at that time. There is here nothing said about the oath. An amendment to section 2 introduced this provision as to swearing to the amount in the first place, but leaves section 4 as it originally stood. 1 S. & C. 475, 476; S. & S. 293.

From these authorities may be gathered what are the rights and remedies of parties to a chattel mortgage. The mortgagee, once in possession of the goods, may sell the same; and he will be required to account for the fair value of the same, or what he got for them, on what is found to be an honest and fair sale. Armstrong *v.* McAlpin, 18 Ohio St. 184.

In the case of Ashley *v.* Wright, 19 Ohio St. 291, it was held that the mortgagee might maintain replevin for the recovery of the mortgaged property, and even before the debt was due, if the mortgage contained a provision that, if the mortgagor should commit waste, or misuse, or attempt to secrete or remove the property, the mortgagee might take possession, and creditors of the mortgagor were levying executions on the property, that authorized the mortgagee to take possession. *Vide* also Smith *v.* Worman, 19 Ib. 145.

In the case of Morgan *v.* Spangler, 20 Ohio St. 38, it was ruled that where a creditor of the mortgagor of personal property causes the same to be seized by legal process for the satisfaction of his

debt, he acquires thereby a lien upon the property, subject to the rights of the mortgagee, and may sustain an action against the latter to redeem the property, or for other equitable relief. And that to an action of replevin by such mortgagee against the officer holding the property by virtue of such process, the creditor may cause himself to be made a party defendant, and by counter-claim therein may set up and enforce his said right to relief. This last proposition, so far as it refers to a counter-claim, is doubtful. Nay, I should unhesitatingly say *not law*, unless the court had said it was. There is no authority in the code of converting a bill in equity into a counter-claim. That represents an action at law, and only that. In this case, the creditor had a right to file a bill in equity, to compel a sale of the property and the distribution of its proceeds, according to the rights of the parties having an interest therein. But the mortgagee was entitled to the possession of the property, and no court could restrain him from obtaining the possession of his own property. The error is in calling what is in fact a petition in equity, like that of a subsequent mortgagee on land, or judgment creditor against the first mortgagee for the sale of the equity, or of the whole title, and for distribution of the proceeds, a counter-claim. The plaintiff in replevin is entitled to his judgment, and the creditor to his bill, to redeem or force a sale and distribution. It introduces infinite confusion and uncertainty by thus converting independent rights of action into a counter-claim, since the counter-claim must be tried by a jury, if the plaintiff's cause of action is to be so tried. There is no authority in the code to try a part of a case by a jury and a part by the court.

A stipulation in a chattel mortgage that the mortgagor shall remain in possession and sell the goods and pay proceeds to mortgagee, does not render the mortgage void. Kleine *v.* Katzenberger, 20 Ohio St. 110.

5. PETITION BY CREDITOR AGAINST MORTGAGEE OF PERSONALTY.

The said A B, plaintiff, complains of the said C D and E F, defendants, for that, heretofore, to wit, at the term of the Court of , within and for the county of , the said plaintiff recovered a judgment, by the consideration of said court, against the said C D, for the sum of $, with interest from the day of , A. D. 18 , and that he caused an execution to be issued thereon, dated on the day of , A. D. 18 , and delivered the same to , sheriff of said county, and that said sheriff, on the day of -, A. D. 18 , levied said execution on the fol-

lowing goods and chattels of said C D, to wit, *(here describe the goods seized on the execution,)* and that the said E F then set up a claim to said goods and chattels so levied on, under a chattel mortgage given by the said C D to said E F, on the day of , A. D. 18 , and which mortgage had duly indorsed thereon the following amount, to wit, $, as due and unpaid thereon, under the oath of the said E F, and which bill of sale was filed so indorsed, and sworn to, with the clerk of the township of , where said C D then resided, (or, with the recorder of said county, located in the township of , where said C D then resided,) and that said E F sets up a claim to said property under said mortgage; and said plaintiff avers that said goods so mortgaged and levied on are of greater value than the said sum indorsed on said mortgage, and that he denies that there is that amount due thereon to said E F, and that he avers that said E F should, in his answer, set up his said pretended claim, and state the amount he claims to be still due thereon. [If there are other persons claiming liens on same, they should be made defendants, by simply averring that G H, etc., set up some claim or lien to said goods, but which the plaintiff avers is subsequent in date to his, and he calls on them to set up in an answer what their claim is, and the date and amount and consideration thereof, and also the date when their pretended lien attached.]

Wherefore the plaintiff prays that an account may be taken of the amount due the plaintiff from said C D on said judgment, and the amounts due to the defendants respectively, and the date of the respective liens of each, and that, unless said defendant pays the sum so found due to the plaintiff, at a day to be named, an order issue to the sheriff of this county, commanding him to advertise and sell said goods as upon execution, and that the proceeds of said sale be distributed to the several parties, according to the liens of each, and for such other and further relief as the nature of the case may in equity require.

E T H, Attorney for Plaintiff.

If the plaintiff's claim arises on a subsequent mortgage, he will set that out as in the preceding form, and then add averments as to any prior mortgage or subsequent one, or liens by execution. On such a petition, the whole equities of the parties may be adjusted, property sold, and distribution made according to equity and law.

6. PETITION ON MORTGAGE.

The said A B, plaintiff, complains of the said C D, E F, G H, and J K, defendants, for that the said C D did, on the day of , A. D. 18 , at , (*place of date,*) make his certain promissory note in writing of that date, and then and there deliver the same to the said E F, and thereby promise to pay to the said E F, or order, the sum of $, in after date thereof, and the said E F then and there indorsed and delivered the same to the said plaintiff; and the said plaintiff further saith that the said C D, to secure the payment of the said promissory note, did, at the same time, duly execute and deliver to the said E F, his certain deed in writing, and thereby conveyed to the said E F his heirs and assigns, in fee simple, the following lands and tenements, situate in said county of , to wit, , (*here describe the lands as in the mortgage,*) and which deed of conveyance had a condition thereunder written, providing that, if the said C D should well and truly pay the said promissory note, according to its tenor and effect, to the said E F, or his order, then said deed should be void; otherwise it was to be and remain in full force and virtue in law; and the said deed of mortgage was duly recorded in the office of the recorder of said county, on the day of , A. D. 18 ; and the said plaintiff further saith that the said C D did, by his deed duly executed and delivered, convey to the said G H his equity of redemption in and to the said premises, to secure to him the said G H, the payment of the sum of $, to be paid to him, the said G H, in after date, with a like condition thereunder written, in case said last-named sum of money should not be paid; which last-named deed of mortgage was duly recorded in the records of said county on the day of , A. D. 18 ; and the said A B further saith that the said C D afterward, on the day of , A. D. 18 , by his deed duly executed and delivered, conveyed all his right, title, and interest in and to the said premises to the said J K, who is now in the occupation, and enjoying the use of the said premises; and the said plaintiff further avers that the said C D did not, when the said promissory note became due and payable, pay the said sum of $, named therein, according to the tenor and effect thereof; nor hath the said C D, or any one for him, since or before said note became due, paid the same to either the said E F, while he so held the same, or to the said plaintiff, since he became the holder thereof, or to either of them at any time.

The said plaintiff, therefore, prays that an account may be taken of the amount due him in the premises, and that a judgment may be rendered that, unless said sum is paid, by a fixed day, with costs of suit, the said lands may be ordered to be sold according to law, to satisfy said sum and costs.

The plaintiff need only ask for the relief he wants. He makes the others parties only to cut off their right to redeem, so that the court can, on its order, make a clear title. The balance, of course, after paying the judgment of the plaintiff, must go to the defendants, according to their respective rights. These rights can be found on a reference to a master, or by the court, and entered in the order of sale, as formerly in a decree. If the claim of the plaintiff is paid before judgment and order of sale, the action is at an end; the defendants can not prosecute it for their benefit. After a decree, all parties to the decree would have the right to insist on a sale.

7. VENDEE *v.* VENDOR, FOR SPECIFIC PERFORMANCE OF A REAL CONTRACT.

The said A B, plaintiff, complains of the said C D, defendant, for that the said C D, on or about the day of , A. D. 18 , was seized in fee simple of a certain tract of land, situate in the said county of , and which is hereinafter more particularly described; and the said C D did then enter into an agreement with the said plaintiff, in writing, signed by the said C D, (or, by E F, his agent for that purpose duly authorized,) whereby the said C D did agree to sell, and did sell, to the said plaintiff the following tract of land, to wit, (*here describe it as in the contract*,) for the sum of $, payable as follows: (*here set forth the amounts and time of payment as in contract*,) and to convey the said premises to the said plaintiff, in fee simple, by deed of general warranty, on the payment of the said several sums of money as aforesaid, (or, on the payment of the last of the said several sums of money as aforesaid;) and the said plaintiff further saith that the said C D, under the said contract of sale, delivered to the said plaintiff the possession of the said premises; and that he, the said plaintiff, has ever since remained in possession thereof, with the assent and permission of the said C D, and has, with the like assent and permission of the said C D, made lasting and valuable improvements thereon; and the said plaintiff saith that he has paid to the said C D, at various times, since the first of said installments became due, the sum

of $, leaving due, as he avers, on the day of , A. D. 18 , to the said C D, on the said contract of sale, the sum of $, which last-named sum the said plaintiff did, on the said day of aforesaid, tender and offer to the said C D, and request him, the said C D, to receive the said money, and convey the said premises to the said plaintiff, according to the terms of his said agreement; and the said plaintiff did then, with said money, present to the said C D a deed of general warranty, duly prepared to convey said premises to the said plaintiff, according to the said agreement, and request said C D to execute and deliver the same; but the said C D did not, nor would he, receive the said sum of money so tendered, and execute the said deed so prepared and tendered, but wholly refused so to do; and the said plaintiff now brings here into court the said sum of $, and offers the same to the said C D, according to the said agreement, and he also brings the said deed, so prepared, ready for the said C D to execute and deliver according to his said agreement.

The said A B therefore prays that the said C D may be adjudged to receive the said sum of $, so tendered, and to execute and deliver the said deed of conveyance so prepared, and convey the said premises to the said A B, in fee simple, by deed of general warranty.

This form is sufficient for a verbal contract, as it sets forth a part performance. It is always well enough to insert these averments, when the money has not been paid promptly at the day, to show that the vendor has waived a strict performance of the contract. Where the vendee has never been in possession, and fails to pay according to his contract, the vendor can rescind by tendering to the vendee his notes and contract, and notifying him that the contract is at an end. Remington *v.* Kelleys, 7 Ohio (pt. 2), 97. If, however, any part of the purchase money has been paid, this also must be tendered back, unless it is declared to be forfeited in case the balance is not paid. Scott *v.* Fields et al., 7 Ohio (pt. 2), 90. Where the purchaser has delayed a long time to pay, the court will not aid him, unless the vendor has permitted him to remain in possession, and make improvements, and has treated the contract as a continuing and subsisting contract. So long as the parties do this, a court will enforce its specific performance. The vendor must do some specific act, in such a case, to terminate the agreement. Higby *v.* Whittaker, 8 Ohio, 198; Brown *v.* Haines et al., 12 Ib. 1; Brewer *v.* State of Connecticut et al., 9 Ib. 189; Fuller *v.* Perkins et al., 7 Ib. (pt. 2), 196; 17 N. Y. 125. In this

case it was held that a mortgagee of the land sold, and the sale of which was sought to be enforced, could not be made a party to a bill for specific performance. 3 M. & Craig, 63; Jacob, 490, 494; 4 M. & Craig, 460; 10 Simmons, 714; 1 Daniel Ch. Pr. 714. Johnson, C. J., said, in the case first cited (17 N. Y. 130), that "the point in this case is so well considered and so clearly settled in Tasker *v.* Small, 3 M. & Craig, 63, that it will be only necessary for me, in disposing of this case, to repeat a part of Lord Cottenham's judgment: 'Generally, to a bill for a specific performance of a contract of sale, the parties to the contract are the only proper parties; and when the ground of the jurisdiction of courts of equity in suits of that kind is considered, it could not properly be otherwise. The court assumes jurisdiction in such cases, because a court of law, giving damages only for the non-performance of a contract, in many cases does not afford an adequate remedy; but in equity, as well as at law, the contract constitutes the right and regulates the liabilities of the parties; and the object of both proceedings is to place the party complaining as nearly as possible in the same situation as the defendant had agreed he should be placed in. It is obvious that persons, strangers to the contract, and therefore neither entitled to the rights, nor subject to the liabilities which arise out of it, are as much strangers to a proceeding to enforce the execution of it, as they are to a proceeding to recover damages for the breach of it. The prior mortgagee has no interest in the specific performance of the contract; he is no party to it; and the performance of it can not affect his security, or interfere with his remedies.' "

Where the lands have been sold to a third person, by the vendor, the vendee can still, on petition against both, obtain a conveyance from the purchaser, unless he be a *bona fide* purchaser, without notice. The notice may be actual or constructive. *Actual* notice is when the purchaser buys with a full knowledge of the first sale; *constructive* notice is where the purchaser, not having such knowledge, a fact exists which in law is held as notice to all the world of the rights of the vendee. If the vendee is *in possession* of the premises, this is notice to all the world of his rights, whatever they may be. Kelly *v.* Stanbury, 13 Ohio, 408. Nor does his ignorance of the fact of such possession at the time of his purchase make any difference. So decided by Supreme Court on the circuit, in Quinn *v.* Geer, in Gallia county.

The purchaser must, of course, be made a party; and the averment to do it is very simple; aver *that the said C D pretends that*

he has sold and conveyed the said premises to the said , on a valuable consideration; but the said plaintiff avers that the said well knew of all the rights of the said plaintiff at the time he so made his purchase, and paid his money thereon.

8. VENDOR *v.* VENDEE ET AL., FOR SPECIFIC EXECUTION OF A REAL CONTRACT.

The said A B, plaintiff, complains that the said C D and E F, defendants, for that the said A B, on or about the day of , A. D. 18 , agreed to sell, and did sell, to the said C D, the following lands and tenement, situate in the said county of , to wit, (*here describe the land as in contract, if there is no mistake in it,*) and the said C D agreed to pay to the said plaintiff therefor the sum of $, to be paid, $ in , and $ in , etc., for which said several payments the said C D gave to the said plaintiff his several promissory notes of that date, payable severally at the several times aforesaid, and the said plaintiff executed and delivered to the said C D his agreement in writing of that date, thereby promising to convey the said premises to the said C D in fee simple, by deed of general warranty, on the payment of the said several sums of money, as aforesaid; and the said plaintiff further saith that he put the said C D into possession of said premises, and that he has continued to occupy the same up to this present time, and that the said C D has paid to the said plaintiff, on said contract of purchase, the sum of $, and that, on the day of , A. D. 18 , there was still due and payable to the said plaintiff, from the said C D, the sum of $; and the said plaintiff did, on the said day of , A. D. 18 , tender and offer to deliver to the said C D his deed, duly executed, to convey the said premises as aforesaid, to the said C D, together with his said notes, on his, the said C D, paying the said sum of $, the balance of said purchase money so due as aforesaid; but the said C D wholly neglected and refused to pay the said sum of $. due as aforesaid, nor has he yet paid the same, or any part thereof, to the said plaintiff; and the said plaintiff further saith that the said C D has contracted to sell to the said E F the following described tract, to wit, (*here describe the land,*) being parcel of the said premises so as aforesaid sold by the said plaintiff to the said C D.

The said plaintiff therefore prays that an account may be taken of the amount due him in the premises, and that said lands may

be sold, according to law, to satisfy said sum and costs, unless the sum so found due and costs of suit are paid by a fixed day.

The land of C D must be first sold, and where there has been several such sales, the land last sold must be first subjected to the payment of the purchase money, and so of all the sales, in the inverse order thereof. Cary *v.* Folsom et al., 14 Ohio, 365.

9. VENDOR *v.* VENDEE ET AL., TO ENFORCE VENDOR'S LIEN.

The said A B, plaintiff, complains of the said C D, E F, G H, and J K, defendants, for that the said plaintiff, on or about the day of , A. D. 18 , was seized in fee simple of the following described lands and tenements, situate in the said county of , to wit, (*here describe them truly;*) and the said plaintiff did then sell the said premises to the said C D, for the sum of $, and did then and there, by his deed of general-warranty, duly executed and delivered to the said C D, convey the said premises to the said C D, his heirs and assigns, in fee simple; and the said C D then paid to the said A B the sum of $, part of said purchase money, and also gave his several promissory notes of that date; one for $, payable, etc., (*here describe them all,*) and delivered them to the said plaintiff, to secure the payment of the said sum of $, the balance of said purchase money; and the said plaintiff saith that the said C D has not paid either of said sums of money, or any part thereof; but that there is now due on said notes, from the said C D, to the said plaintiff, the sum of $, which the said C D, though often requested, wholly neglects and refuses to pay; and the said plaintiff further avers that the said E F purchased of the said C D a portion of said premises with the full knowledge that the said C D had not paid the balance of said purchase money, as aforesaid, and took a conveyance from the said C D to him, for the said premises so by him purchased of the said C D; and the said plaintiff further avers that the said G H and J K claimed to have recovered judgment against the said C D for a large sum of money at the term of this court, A. D. 18 , and have severally caused an execution to be issued and levied on the remainder of said premises, so as aforesaid not sold to the said E F, and are proceeding to cause the said premises, so levied on, to be appraised, advertised, and sold; whereby the said plaintiff will wholly lose the balance of the said purchase money, as the said C D is wholly insolvent and unable to pay the same.

The said plaintiff therefore prays judgment against the said C D for the said sum of $, together with interest thereon from the day , A. D. 18 , and an order that in case the said C D shall not pay the said judgment by a short day to be named, the said premises may be sold, and so much of the proceeds as may be necessary be applied to the payment of the judgment so to be rendered.

As to liens for purchase money, *vide* McArthur *v.* Porter, 1 Ohio, 99; Jackman *v.* Halleck, 1 Ib. 318; Tierman *v.* Beam, 2 Ib. 383; Patterson *v.* Johnson, 7 Ohio (pt. 1), 225; Boos*v.* Ewing et al., 17 Ohio, 500. If the vendor takes security on his notes for the purchase money, his lien is gone. Williams *v.* Roberts, 5 Ohio, 35; Mayhem *v.* Coombs et al., 14 Ib. 428, 435; Follet *v.* Reese et al., 20 Ib. 546. One who loans money to another to buy land, has no lien on the land. He is not a vendor. Stansell *v.* Roberts et al., 13 Ohio, 148. There is no lien until the title is passed. Brush *v.* Adams, 14 Ohio, 20.

10. PETITION BY PARTNER FOR AN ACCOUNT.

The said A B, plaintiff, complains of the said C D and E F, defendants, for that the said A B, on or about the day of , A. D. 18 , did enter into partnership with the said C D and E F, for the purpose of carrying on the business of , in , in the county of , for the term of years next thereafter; that the said plaintiff paid in, as capital to the said business, the sum of $; and that the C D paid in as capital, the sum of $, and that the said E F paid in, as capital, the sum of $; and that, on or about the said day of , A. D. 18 , the said plaintiff and defendant commenced the said business, as such partners, under the firm and style of , and continued in the same until the day of , A. D. 18 , when, by the mutual consent of the said partners, the said firm was dissolved, and, by the like consent, the said C D and E F agreed with the said plaintiff to take the stock on hand at the valuation of , and also to proceed and collect the debts due said firm, and pay the debts due by the same, and render, from time to time, to the plaintiff, on demand, full statements of the debts due to and owing by the said firm, and the payments made on account thereof; and, on a final adjustment, to pay over to the said plaintiff his full share of the assets of said firm; and the said plaintiff saith that the said defendants proceeded to take possession of all the assets of said firm of , so dissolved, and to settle, col-

lect, and pay, according to the said agreement, as they repeatedly informed and stated to the said plaintiff; but the said plaintiff avers that the said defendants have collected the debts due to the said firm, and applied the proceeds to their own use, instead of paying the debts thereof, and distributing any balance coming to the said plaintiff; and the said plaintiff avers that the said plaintiff has repeatedly requested the said defendants to give him a full and accurate statement of the assets of said firm, which came to their hands, and of their proceeding in the premises; but the said defendants have utterly neglected and refused to render any such account, or to pay over to the said plaintiff any portion of said assets.

The said plaintiff therefore prays that an account may be taken touching said partnership affairs, and said defendants compelled to furnish a full and complete statement of their doings in the premises, and, on the final hearing, be compelled to pay over to the plaintiff any moneys found due him from said defendants, on such final settlement of the affairs of said firm, and for such other and further relief as equity and good conscience may require.

In order to justify a decree for an account in a case like this, there must be proof that the plaintiff was a partner of the defendant or defendants. Wright, J., in Salter *v.* Ham et al., 31 N. Y. 321, 326, says: "To entitle the plaintiff to have an account and distribution of the property, stock, and money referred to in his complaint, the relation of partners must have existed between himself and the defendant Ham during the time therein stated. If he was not such partner, or a member of the firm of D. H. Ham & Co., he had no right to an accounting in respect to the business and property of Ham, or of such firm. The preliminary question then was, whether, from December, 1855, to January, 1862, the plaintiff and Ham were partners *inter se* in the business called 'Dr. Ham's Invigorating Spirit.'" In Auld *v.* Butcher, 2 Kan. 135, the court say: "If the defendant, as in this case, requested or assented to the taking of the account, the accounting was ordered of course, and reference made accordingly. There is nothing in the code changing substantially this remedy, and it is believed to be still the correct practice to dispose of all matters in bar of an accounting before the account is stated, and that if a defendant chooses not to set up such bar, but to take his chance of getting a report in his favor, and prays that the account may be taken, he waives the bar, and should not be allowed to raise it afterward." The defense in

this case was the statute of limitations. The petition on its face showed that the claim was barred. The defendant answered, admitting the partnership, and claiming a large sum due him, and asked for an account. The reference was had, the account stated, and, turning out against the defendant, he claimed then that the whole case was barred. The court held he had waived that defense, and could not then set the bar up to defeat a recovery. It may be doubtful whether this would be good law in Ohio, where the statute extinguishes the debt or claim, so that no action can be maintained on it.

In case the firm has not been dissolved, the averment will be varied a little, merely alleging that the partnership has expired.

11. JUDGMENT CREDITOR *v.* JUDGMENT DEBTOR AND FRAUDULENT GRANTEE.

The said A B, plaintiff, complains of the said C D and E F, defendants, for that that the said A B did, at the term of this court, A. D. 18 , recover a judgment against the said C D, for the sum of $, debt, and $, costs of suit, which judgment still remains in full force and effect in law, unreversed and unsatisfied; that the said A B afterward caused an execution to be issued thereon against the property of the said C D, and which execution, for the want of goods and chattels of the said C D, the sheriff of the said county levied on the following real estate, to wit, (*here describe it,*) and the said plaintiff avers that the said C D is wholly insolvent, and has no property liable to execution whereof the said plaintiff can make the amount of his said judgment; and the said plaintiff saith that the said C D did, on or about the day of , A. D. 18 , convey the said premises, so as aforesaid levied upon, to the said E F, without consideration, and with the intent and for the purpose, as the said E F then well knew, of delaying, hindering, and defrauding the said plaintiff out of his said claim, and others, the creditors of the said C D, out of their just demands and claims against him, the said C D.

The said plaintiff therefore prays that the said deed of conveyance from the said C D to the said E F may be declared null and void, and be wholly set aside, and the said lands and tenements be ordered and adjudged to be appraised, advertised, and sold, and the proceeds of said sale be applied to the payment of the said judgment of the said plaintiff, together with the costs thereon.

A petition of this character can not be filed under the code be-

fore judgment and execution on the legal claim any more than it could under the old chancery law and practice. The right of the party is an equitable right, and does not exist until a failure to make the money on execution. What right, then, has one to sue a fraudulent grantee, or the debtor of his debtor, until he has exhausted his direct remedy against the debtor himself? To hold that he can do it in the first instance, is to create a right which never did exist in equity. The code has not altered the law; the right to sue the fraudulent grantee, or the debtors of the debtor, is a right dependent on a condition to be performed; and that condition is that the claim has been reduced to judgment, that an execution has been returned *nulla bona*. Now, what right has a court to say that these conditions may be disregarded? Our former practice act dispensed with an execution, but that act is now repealed, and the law, as administered in courts of equity, is now alone in force, without the modifications introduced by our former acts, regulating the equitable jurisdiction and practice of our courts as courts of chancery.

Section 458 of the code provides for this whole matter. It is there enacted that, when any *judgment* debtor has not personal or real property subject to levy on execution, sufficient to satisfy the judgment, any equitable interest which he may have in real estate, as mortgagor, mortgagee, or otherwise, or any interest he may have in any banking, turnpike, bridge, or other joint-stock company, or any interest he may have in any money contracts, claims, or choses in action, due or to become due to him, or in any judgment or decree, or any money, goods, or effects which he may have in the possession of any person, body politic, or corporate, shall be subject to the payment of such *judgment by action*, or as in this chapter prescribed. The remedy provided in that chapter is a sort of Spanish Inquisition remedy, and a palpable violation of the constitution; since it assumes to transfer and apply a man's property without the intervention of a court, or pleadings, or process. It creates a sort of Star Chamber court, before which a party is forced to appear, and be subjected to an inquisitorial examination without limits, without notice, before no court, and ordered to apply his property by an individual, who, though called a judge, is yet no court. The whole proceeding there provided for is an outrage on personal rights, and savors very much of the Shylock doctrine —a pound of flesh, or my money.

This section, however, does provide that equitable assets can be reached by *action;* but it is only after judgment, and when the

debtor has not personal or real property subject to levy on execution. This section is plain and explicit, and needs no comment. The New York code has been held to authorize an action to reach equities to be joined with the original action on the legal claim. 10 Pr. 225.

12. PETITION TO DELIVER UP NOTES AND ACCOUNT FOR A TRUST.

The said A B, plaintiff, complains of the said C D, defendant, for that one Stephen W. Brown did, on or about the 4th day of May, A. D. 1846, assign and transfer to the said C D, defendant, a bond and mortgage given by one to said Brown for $3,000, the sole property of the said Stephen W. Brown, as collateral security for the payment of three promissory notes, of $1,000 each, two of which notes were made by the said Stephen W. Brown alone, and one by the said Stephen W. Brown and one Rossiter, as partners, under the name of Brown & Rossiter; and that the said Rossiter was bound to pay one-half of the said note for $1,000, executed by said firm of Brown & Rossiter; and the said plaintiff further saith that the said defendant collected the amount due upon said note and mortgage, and applied the same to the payment of the said three several notes, for $1,000 each; and that the said amount so received on said bond and mortgage paid the whole sum due on the said three several notes of $1,000 each, and left an overplus in the hands of said defendant of $89.52; and the plaintiff further saith, that, on the 30th day of May, A. D. 1846, the said Stephen W. Brown assigned and transferred to the said plaintiff all his estate, real and personal, and rights in actions, and shortly thereafter, and before the collection of the said sum of money on said bond and mortgage, by the said defendant, departed this life; and that there has never been any personal representative appointed on the estate of the said Stephen W. Brown, who, as the said plaintiff avers, died wholly insolvent; and the said plaintiff saith that, after the collection of said sum of $3,000, and interest on the said bond and mortgage, he, the said plaintiff, on the day of , A. D. 18 , requested the said defendant to pay to the said plaintiff the said sum of $89.52, and to deliver to him, the said plaintiff, the said three several promissory notes, of $1,000 each, before described; yet the said defendant did not, nor would, pay the said sum of $89.52, and deliver the said three several promissory notes aforesaid.

The said plaintiff therefore prays judgment against the said defendant for the said sum of $89.52, together with interest thereon

from the said day of , A. D. 18 , and also that the defendant may be adjudged and ordered to deliver up to the said plaintiff the said three several promissory notes, so as aforesaid described.

This is substantially the petition in the case of Cahoon et al. *v.* Bank of Utica. It is first reported in 7 Pr. 134, where the Supreme Court held the petition bad on demurrer, on the ground of misjoinder, there being here a demand for money, and also a prayer for specific relief in equity. But in the Court of Appeals, 3 Selden, 486, five judges to two held the complaint sufficient, on the ground that the whole case was one in equity, founded on a trust, growing out of the deposit of the bond and mortgage with the defendant, in trust, to collect the same to pay the three $1,000 notes, and then to give up the three notes, and pay any balance left in his hands, over and above satisfying the said three notes. This decision seems to settle that law and equity can not be combined in the same petition, requiring, as they do, separate trials—one by a jury, and the other by the court.

13. SURETY *v.* PRINCIPAL AND CREDITOR, TO COMPEL HIM TO PAY THE DEBT.

The said A B, plaintiff, complains of the said C D and E F, defendants, for that the said C D did, on the day of , A. D. 18 , at (*place of date,*) as principal, and the said plaintiff, as his surety, make their promissory note in writing of that date, and then delivered the same to the said E F, and thereby agreed, as such principal and surety, to pay to the said E F the sum of $, in months after the date thereof, and the said plaintiff saith that the said promissory note is now due and payable, and has been for the space of months last preceding; yet the said C D hath not paid the said sum of money in said note named, nor any part thereof, to the said E F, whereby the said plaintiff is still held liable thereon to the said E F, for the amount of the said promissory note, with interest thereon.

The said plaintiff therefore prays that an order or judgment may be rendered against the said C D, requiring and compelling him to pay to the said E F the said sum of $, together with interest thereon from the said day of A. D. 18 .

This is filed under section 500 of the code. It is substantially what our courts had before decided could be done in equity, after judgment had been obtained. McConnell *v.* Scott et al., 15 Ohio, 401; Stump *v.* Rodgers, 1 Ib. 533.

By section 501, the surety may, before the debt becomes due, sue his principal to obtain indemnity against the debt, or liability, whenever any of the grounds exist upon which an order may be made for an arrest or for an attachment. The petition, in this case, will follow the above, so far as the giving the note or contracting the liability is concerned; it will then aver that the said principal has done one of the acts specified under the heads of arrest or attachment, in the same form as is stated in affidavit, and then prays that the said defendant may be adjudged to indemnify the said plaintiff against the said liability. The remedy is not here pointed out, nor is it elsewhere; but it must consist in requiring the party to give an undertaking, with other surety, to the plaintiff, to pay the claim, or if he can not do that, then to render a judgment that he pay the debt at once. The payee must, of course, be a party, so the money can be ordered to be paid to him.

14. TO STAY WASTE.

The said A B, plaintiff, complains of the said C D, defendant, for that the said plaintiff, being seized in fee simple of, or otherwise well entitled to, the premises hereinafter described, did, by a certain indenture, bearing date , A. D. 18 , and made between the said plaintiff and the said defendant, demise, and lease unto the said C D, his heirs and assigns, the following real estate, to wit, (*here describe the premises as in the lease,*) to have and to hold the same to him, the said C D, his heirs and assigns, from the day of , A. D. 18 , then last passed, for the term of thence next ensuing, at the yearly rent of $, payable, (*here state as in lease;*) and the said C D did, in said indenture, covenant with the said plaintiff, his heirs and assigns, that he, the said C D, (*here state the covenant shortly, as to keeping buildings and premises in repair, and as to managing and cultivating the land;*) and the said plaintiff saith that the said C D took possession of the said premises, under and by virtue of the said demise, the same being then in good repair and condition; but the said plaintiff saith that the said premises have since become ruinous, and in bad repair, and the said lands are very much deteriorated, from the willful mismanagement and improper cultivation thereof by the said C D; and that he, the said C D, has permitted the roofs of the buildings

thereon to become open and leaky, so that the rain runs through the same into the rooms and building, whereby the timber is liable to become rotten, and the said building to become ruinous; and the said C D has plowed certain fields containing acres, laid down to grass, contrary to terms of his said lease, and has otherwise committed great spoil, and waste, and destruction in and upon the said premises; and the said plaintiff saith that he hath sustained damages, by reason of the premises, to the sum of $; and the said plaintiff further says that the said C D has and does threaten to commit further and other destruction in this—that the said defendant threatens to, (*here state what he threatens to do, which is claimed to be waste.*)

The said plaintiff therefore prays judgment against the said C D for the said sum of $, his damages for the waste aforesaid; and also that the said defendant may be perpetually enjoined from, (*here state the act to be enjoined.*)

15. TO CANCEL AN AGREEMENT.

The said A B, plaintiff, complains of the said C D and E F, defendants, for that the said A B did, on or about the day of , A. D. 18 , at , make his certain promissory note in writing of that date, and then deliver the same to the said C D, and thereby promised to pay to the said C D, or order, the sum of $, at the bank of , in the city of , in the State of , in months after the date thereof, and that the said C D then indorsed and delivered the said note to the said E F, and the said plaintiff saith that the said note was so made and indorsed by the said parties thereto, to enable the said E F to get the same discounted at the bank of , in , and not elsewhere, and that, if the same was so discounted, then the said E F was to apply the proceeds to the payment of a claim which he, the said E F, then held against the said C D; and the said plaintiff further saith that it was further agreed, by and between the said plaintiff and the said defendants, that in case said bank of would not discount the said promissory note, then the said E F was to return the same to the said plaintiff to be canceled; and the said plaintiff further saith that the said E F did present the said promissory note to the said bank of , and that the said bank of declined and refused to discount the same; and the said plaintiff saith that the said E F still retains said note in his possession, and has neglected, and on demand refused, to deliver the same up to the said plaintiff, but threatens and claims that he will present the same to some

other person or bank for discount, whereby the said plaintiff would be liable to pay the same.

The said plaintiff therefore prays that the said defendant E F may be adjudged to deliver up to the said plaintiff the said promissory note, and meantime be enjoined from procuring the same to be discounted, or from transferring the same, under any pretense whatever.

A petition of this character must, of course, depend upon the facts of the case and the character of the contract to be delivered up. The above form will serve as a hint for the main averments necessary to be contained in the petition. It must show that the paper is a nullity in equity, either by having been paid, or by reason of having been, as in this case, executed for a particular purpose, which purpose has been defeated, so that the note, or bill, or contract, ought not to be used for any purpose whatever.

16. TO SET ASIDE A DEED OBTAINED BY FRAUD

The said A B, plaintiff, complains of the said C D, defendant, for that the said A B, on or about the day of , A. D. 18 , was seized in fee simple of the following lands and tenements, situate in the county of aforesaid; and the said plaintiff further saith that the said C D, by fraud and misrepresentation, induced the said plaintiff to convey the said real estate to him, the said defendant, his heirs and assigns, for the consideration of $, when he, the said defendant, well knew said premises were justly worth the sum of $; and the said plaintiff further saith that the said C D by fraud drew and procured the said plaintiff to execute and deliver to the said defendant a deed, conveying the said real estate to him, the said C D, his heirs and assigns, when he well knew that the said plaintiff intended and designed to execute and deliver to the said C D a deed demising to the said C D the said premises for the life of the said C D; and the said plaintiff further saith that the said defendant by fraud procured and induced the said plaintiff to execute and deliver to the said defendant, a deed of the said premises, conveying the same to the said defendant in fee, by fraudulently representing to the said plaintiff that the said deed of conveyance was a mere lease of said premises to the said C D for the term of years; and the said plaintiff saith that, relying on the said representations of the said defendant, she did execute and deliver the same as and for such lease, and for no other purpose whatever.

The said plaintiff therefore prays judgment against the said defendant, that the said deed so obtained may be ordered to be delivered up, and canceled, and held for naught.

This form is drawn on the opinion of Morris, J., in Wooden *v.* Strew, 10 Pr. 48. He held that nothing could be stated in the pleading but the naked averments; that all else was mere evidence, which should be stricken out as irrelevant and redundant. The correctness of this decision may well be doubted. The *facts* constituting a cause of action in a chancery case, and by the law regulating chancery practice, are very differently stated from a proceeding at law. In the case of equity pleading, the facts showing the deed to have been obtained by fraud, should be stated so that the court could see that it ought to be set aside. If misrepresentation was the mean, that should be stated, not that it was obtained by misrepresentation, but the particular misrepresentation should be stated. So, at law, a plea that the deed was obtained by fraud was bad, unless it set forth wherein the fraud consisted.

17. ANOTHER FORM.

The said A B, plaintiff, complains of the said C D, defendant, for that the said A B was, on or about the day of , A. D. 18 , seized in fee of the following real estate, situate in the county of , to wit, (*here describe it,*) and that, being so seized, the said defendant applied to the said plaintiff to purchase the same, and the said plaintiff, living at a distance from the said premises, and knowing but little as to their value, personally informed the said defendant that he, the said plaintiff, would sell the same for a fair value in money, but that he knew very little as to their present value, and the improvements going on in their vicinity, tending to increase the present value thereof; and the said plaintiff inquired of the said defendant if any improvements were being made, or contemplated to be made, which would tend to enhance the value thereof, and also whether there were on said premises any valuable minerals, which added to their value beyond what it would be as mere farming land; and the said defendant then represented that he knew of no such improvements being made, or contemplated to be made, nor of any minerals thereon which could increase their value, and the said plaintiff, relying and confiding in the truth of the said statements of the said defendant, did then agree to sell, and did sell, to the said defendant, the said premises

for the sum of $, which he, the said defendant, then paid to the said plaintiff; and the said plaintiff then executed, in due form, and delivered to the said defendant, a deed of that date, conveying the said premises to the said defendant in fee simple; and the said plaintiff avers that, at the time of the said purchase, the railroad line of had been located in the immediate vicinity of the said premises, and a depot thereof established within one mile of the said premises, and that there were on the said premises beds of valuable coal and iron, and the said premises were then worth, in cash, the sum of $, instead of the said sum of $; of all which the said defendant then well knew, when he so made his false and fraudulent representation, as aforesaid, to induce said plaintiff to sell and convey the said premises as aforesaid; and the said plaintiff further saith that as soon as he discovered the falsehood of said representation, to wit, on the day of , A. D. 18 , he applied to the said defendant, and tendered to him the said sum of $, so paid for said premises, and requested the said defendant to reconvey the said premises to the said plaintiff; but the said defendant did not, nor would he, receive the said sum of $, and reconvey said premises to the said plaintiff, but so to do, he, the said defendant, wholly refused; and the said plaintiff now brings here into court the said sum of $, ready to be delivered to the said defendant, whenever he will accept the same, and reconvey the said premises to the said plaintiff.

The said plaintiff therefore prays a judgment against the said defendant, that he, the said defendant, do reconvey to the said plaintiff the said premises so fraudulently purchased of the said plaintiff; (or, that the said contract of sale and the said deed of conveyance may be adjudged to be fraudulent and void, and be wholly vacated, and set aside, and held for naught, and the said defendant be ordered to release to the said plaintiff all his title in and to the said premises.)

It would seem that the petition should, as in this form, state what the misrepresentation was, without setting forth how it was to be proved. Unless the facts are stated, no case is presented for relief. *Fraud* is a conclusion of *law*, not the assertion of a *fact*. The fact should be stated, and then the legal conclusion, whether that is fraud, will be drawn by the court. It is not enough, in a declaration on a fraudulent sale, to state that he induced the party by fraud to make the purchase; the particular representation must be stated, and this representation must be averred to be false, and that

the party knew it so to be when he made it. So much should be required in all cases founded upon fraud, whether at law or in chancery.

18. ON A LOST NOTE.

The said A B, plaintiff, complains of the said C D, defendant, for that the said defendant, on or about the day of , A. D. 18 , made his certain promissory note in writing of that date. (or, *if the date is uncertain, say*, dated on or about the day of , A. D. 18 ,) and then delivered the same to the said plaintiff, and thereby promised to pay to the said plaintiff, or order, the sum of $, in months after the date thereof; which period has now elapsed, and the said plaintiff further saith that, after the giving of the said promissory note, and before it became due, he lost the same, and that, at the time of said loss, he, the said plaintiff, had never indorsed the said promissory note to any person whatever; and the said plaintiff further saith that he afterward, when the said promissory note became payable, notified the said defendant that the same had been so lost by the said plaintiff, and then requested the said defendant to pay the said sum of money therein named, and the said plaintiff then offered and tendered to the said defendant a good and sufficient agreement in writing, signed by the said plaintiff, and , as his sureties, promising to indemnify the said defendant against all liability, by reason of said lost note; yet the said defendant did not, nor would, pay the said sum of money, or any part thereof, to the said plaintiff; and the said plaintiff now brings here into court his said agreement of indemnity, and hereby offers the same to the said defendant.

Wherefore the said plaintiff prays judgment against the said defendant for the said sum of $, together with interest thereon from the said day of , A. D. 18

In the case of Crow *v.* Clay, 25 Eng. L. & Eq. 451, it was held that a plaintiff could not recover at law on a lost negotiable bill or note. He must produce the note on the trial, and hence be the holder of it, in order to recover. His remedy in such a case is in equity. Byles on Bills, 302; 6 Ves. 812; Hansard *v.* Robinson, 7 B. & C. 90; Champion *v.* Terry, 3 B. & B. 295. Where there is no court exercising equity powers, a court of law has required the indemnity. Fales *v.* Russell, 16 Pick. 315. But in Thayer & Mason *v.* King, 15 Ohio, 242, it was held that if the note was lost after due, a suit at law could be maintained on the note; and hence that,

in such a case, no indemnity was necessary. But the case of Crow *v.* Clay, 25 Eng. Law & Eq. 451, maintains a directly contrary doctrine. The court says that it is a well-established fact that, in an action on a negotiable bill, the plaintiff must be the holder at the time he sues upon it; and if he has lost it, he can not maintain an action upon it. The plaintiff can not throw on the defendant the consequences of his own negligence; because, if in fact the negotiable instrument has been indorsed, the holder would not be bound by a judgment in a suit to which he was not a party. Hence the payee is entitled to an indemnity in any contingency, and the plaintiff should be required to give it. It is his own fault that the note is not in his possession, to be delivered up, as the maker has a right to have it; and hence he should be required to indemnify the maker against even the possibility of a loss, even the possibility of the fraud of the plaintiff himself. It is said that if the note has been destroyed, the plaintiff may recover on secondary proof of its contents. Hinsdale *v.* Bank of Orange, 6 Wend. 378. But even in this case, the defendant runs the risk of a false recovery, while the note may be still outstanding. Is he not entitled to be secured against even this contingency? It would seem so, since it arises from the negligence of the plaintiff. *Vide* Rowley *v.* Ball, 3 Cowen, 303; Posey *v.* Decatur Bank, 12 Ala. 802; Morgan *v.* Reintzel, 7 Cranch, 273; Aborn *v.* Bosworth, 1 R. I. 401; Swift *v.* Stevens, 8 Conn. 431; Rogers *v.* Miller, 4 Scam. 334.

19. PETITION FOR SETTLEMENT OF MUTUAL ACCOUNTS.

The said A B, plaintiff, complains of the said C D, defendant, for that the said plaintiff and defendant have had mutual dealings, running through years, and that, as the result of said dealings, the said plaintiff and defendant have kept books of account touching and evidencing such dealings, which account, and the items of it, extend to more than in number; and the said plaintiff further saith that, on the day of , A. D. 18 , he applied to the said defendant to produce his accounts of said dealings, and come to a settlement and adjustment of the same, the said plaintiff then offering to produce his books of account, touching said mutual dealings, and there offered to look over and compare said books, and settle and adjust said accounts between the said plaintiff and the said defendant; but the said plaintiff avers that the said defendant then refused to produce his said books of account, and to settle and adjust the said mutual accounts between the said parties, and hitherto hath wholly refused to come to an account

with the said plaintiff touching the said mutual dealings between the said parties.

The said plaintiff therefore prays that the said defendant may be ordered and adjudged to come to an account touching said matter, and that, in case a balance should be found in favor of the said plaintiff, a judgment may be rendered therefor against the said defendant.

Chancery has jurisdiction in case of mutual accounts. Johnson *v.* Wallace, 7 Ohio (pt. 2), 62; Taylor *v.* Miami Exporting Co. et al., 5 Ohio, 162. Under the code, the petition need not—nay, should not, set out the accounts as claimed by the plaintiff. The fact of mutual accounts gives the court jurisdiction to decree that the parties account before the master. In taking accounts, the plaintiff should first present his account to the master. The defendant should then present his; and the master should then compare the two; see where they agree, and where they disagree. When they agree, no further evidence need be taken; when they disagree, or when either party objects to items in the accounts of the other, these items must be sustained by proof taken before the master; and, on these admissions and proofs, the master should state the accounts as he finds the truth to be, and report his finding to the court. Either party may then except to the report, or any items contained in it, and these exceptions will be passed upon by the court, and sustained or overruled as the evidence, in the opinion of the court, seems to require.

The decision in such a case is simply that the parties do account with each other touching their said dealings, and that the case be referred to the master for that purpose.

Each party should be required to verify, by his oath, all statements presented by him to the master. The master may also require the parties to produce their books of account, but he has no right to examine any other account than the one in dispute. The owner of the book has a right to fasten up the balance of the book, though he must make oath that the part thus sealed up does not contain any item relating to the account in controversy.

Where an account has been stated in writing between the parties, and the balance struck, no action for an account will lie. 1 Story's Eq. 497, sec. 523; 1 Atk. 1; 2 Bro. Ch. 310; 2 Atk. 399; 3 Bro. Ch. 266. But if there has been any mistake, or omission, or fraud, or undue advantage, by which the account stated is vitiated, and the balance incorrectly fixed, the account may be opened in equity;

but the petition must show the account, and point out wherein the errors consist. The petition must, as it is called, *surcharge* and *falsify*, that is, it must point out what is omitted and what is wrongfully charged. 1 Story's Eq. 498; 2 Ves. Jr. 565; 11 Wheat. 237; 1 Johns. Ch. 550.

20. PETITION TO CORRECT A STATED ACCOUNT.

The said A B, plaintiff, complains of the said C D, defendant, for that the said plaintiff and defendant, having before that time had sundry mutual dealings between them, did, on the day of , A. D. 18 , come to a mutual accounting between them touching said mutual dealings, and on said accounting a statement of the said account was made in writing, whereby a balance of $ was found to be due from the said plaintiff to the said defendant, on the final adjustment of the said accounts; but the said plaintiff avers that, since the said adjustment and settlement of the said accounts, he has discovered sundry errors and false charges therein, of which he was wholly ignorant at the time he so settled said accounts, and struck the said final balance; and the said plaintiff further saith that, in the statement of said account, so as aforesaid made and settled, he is charged, (*here state the items wrongfully charged, and point out why so wrongfully charged;*) and the said plaintiff further saith that the following items, which ought to have been entered to his credit in said account, were wholly omitted therefrom, by mistake and oversight, to wit, (*here set forth the items, with date, amount, etc.;*) and the said plaintiff further saith that the said account ought to be so corrected, and the balance thereon ought to be $ in favor of the said plaintiff, instead of being $ in favor of the said defendant, as in the said stated account; and the said plaintiff further saith that, as soon as he discovered the said mistakes and errors in said stated account, he, on the day of , A. D. 18 , called on the said defendant, and pointed the same out to him, and then requested the said defendant to correct the same, and to restate the said account, with the mistakes and errors aforesaid corrected; but the said defendant then, and ever since, has refused, and still does refuse to restate the said account and correct the said errors and mistakes so made against the said plaintiff; and the said plaintiff avers that, if the said errors were corrected, the said defendant would owe the said plaintiff the sum of $, at the date of the said account so stated.

The said plaintiff therefore prays that he may be let in to prove the said errors and mistakes in the stating of the said account,

and that judgment may be rendered against the said defendant for the said balance of $, due him on said corrected account, with interest thereon from the day of , A. D. 18 .

The issue in such a case will, of course, be on the errors pointed out. The defendant must deny the errors so pointed out, if he can, and then evidence will be heard in reference to these items, and no others; and the account will be corrected as the proof shall show the truth of the averments. The party averring the error must prove it; as the account is *prima facie* true until proved to be erroneous.

Where one has been induced to state an account on fraudulent misrepresentations, the entire account may be set aside and the parties required to account anew. In such case, the petition will be framed like one to set aside a deed, or note obtained by fraud. The account is a thing, like a note or other contract, to be dealt with and set aside, in case the fraud is established.

21. PETITION TO ADJUST LIENS AND PROCURE A SALE OF REAL ESTATE.

The said A B, plaintiff, now comes, and complains of the said C D, E F, G H, and L M, defendants, for that the said plaintiff did, on the day of , A. D. 18 , in the Court of Common Pleas, in and for the county of , at the term thereof, recover a judgment against the said C D, for the sum of $ and cents, with $, costs of suit; which said judgment remains in full force in law, and wholly unpaid; and the said plaintiff further saith that the said C D has no goods and chattels, lands and tenements, liable to execution, out of which said judgment can be satisfied; and the said plaintiff further saith that the said C D is seized of an equity of redemption in the following real estate, situate in said county of , to wit, (*here give a description of the premises,*) and that the said E F, at the date of the said judgment, claimed to hold a mortgage on said premises, to secure a sum of money due him from the said C D; and the said plaintiff further saith that the said G H and L M claim to hold some lien on said premises, to secure some sum or sums of money due to them respectively from the said C D.

The said plaintiff therefore prays that the said E F, G H, and L M may set forth their respective claims and liens in and to the said premises; that the court will adjust the priorities of the same with that of the said plaintiff, and among the said defendants; and

that the said real estate may be decreed to be sold, and the proceeds thereof applied on said claims according to the respective priorities of the liens thereof, as the same shall be settled by this court.

A case of this character scarcely comes within the definitions of the code, as to a petition and answer. The object of the suit is not a judgment, in the true meaning of that term; but to procure an adjustment of the order of liens to the real estate, and a sale of the same, and an application of the proceeds on the various claims, according to their respective priorities. The answers in this case do not, and can not come within the definition contained in the code; the matters contained in them constitute neither a defense nor counter-claim nor set-off: its office is simply to bring facts upon the record, showing the party's claim, so that the court may be able to adjust their respective priorities. These facts are no defense to the plaintiff's claim, nor do they constitute a counter-claim or set-off; and yet they must be admitted, in order to enable the court to pass upon the respective rights of the parties, and administer justice. The truth is clear, that the code can not be made to meet the necessities of the various cases which must arise out of the law regulating equitable rights, unless we disregard its letter and go behind its language; so as to expound its definitions differently, as they are to be applied to a case at law or in equity. In this way we may make it answer the purposes of justice and its administration, and we can do it in no other way.

22. PETITION TO SET ASIDE A DECREE RENDERED WHILE PLAINTIFFS WERE MINORS.

The said A B and C D complain of said , for that one John Mulford died, on or about the day of , A. D. 18 , in said county of , intestate, leaving as his children and heirs at law, S J L, intermarried with said J E L; Mary Ann Morrison, intermarried with said R M; J M, J M, and D M, and as his widow Mary M; that said Sarah Jane was born in March, A. D. 1832; Mary Ann in April, A. D. 1835; David in 1812; Jacob, A. D. 1815; and Job in December, A. D. 1817; that Sarah Jane was married in September, A. D. 1860, and Mary Ann in October, A. D. 1861; and the plaintiffs further say that the said John Mulford at his death was seized in fee of the following real estate, situate in said county of , (*here describe the real estate,*) and that, on or about the

day of , A. D. 18 , the said David, Jacob, and Job Mulford combined and confederated together to cheat and defraud the said plaintiffs, S J and M A, out of their just shares of said real estate, and that for the purpose of carrying out said fraud, J M filed a bill in chancery in the Court of Common Pleas, within and for said county of , against the other children and heirs at law of said J M, to wit, , and the said M M, the widow of said J M, deceased, in which he, said J M, falsely and fraudulently represented that in consideration that said Jacob and Job M had each labored for their said father several years after they arrived at their majority, he, said J M, deceased, agreed with them to divide between them the first three described tracts of land, amounting in all to two hundred and sixteen acres or thereabouts, independent of the interest of the said Jacob M and Job M in the said home farm, and convey the same in fee simple to the said J and J M; and that the said Jacob M in said bill did further falsely and fraudulently represent that for the like consideration, the said J M, deceased, had agreed with said D M to convey to him in fee the said tract of seventy-five acres; and that said J M departed this life without having conveyed to said Jacob M and Job M and David M, respectively, in fee or otherwise, the said several tracts of land so by him agreed to be conveyed as aforesaid; and that at his death the said John M, deceased, was still the owner in fee of said home farm above described; and that the said Jacob M, in his said bill in chancery, prayed that the dower of the said M M might be assigned to her in said home farm, and partition of the same subject to said dower estate might be made between the said Jacob M, Job M, David M, Sarah J, and Mary Ann M, in equal proportions, and that one-half of said 216-acre tract might be decreed to said Jacob M.

And the said plaintiffs further say that to the said bill in chancery the said David M and Job M answered, and falsely and fraudulently admitted that the statements and averments in said bill were true, and they, the said D M and Job M, asked that the relief prayed for might be granted, and that the land above described, so sold to them, might be decreed to them, and that partition might be made of the said home-farm as prayed for in said petition.

The said plaintiffs further show that such proceedings were had in said case that afterward, to wit, at the term of said Court of Common Pleas, A. D. 18 , a decree was entered adjudging and quieting the title of Jacob M and Job M to said 216-acre tract and the title to the 75-acre tract to the said David M, and assigning

dower to said widow, Mary M, in said home farm, and making partition thereof subject to said dower equally among said plaintiff and the other defendants, and forever barring the said plaintiffs in and to the said 216-acre and 75-acre tracts, and that said dower was assigned and partition made and confirmed at the term of said court, A. D. 18 .

And said plaintiffs further show that they were minors at the time of the filing of said bill and rendering said decree; that no service was ever made on them in said suit, nor were they or either of them duly notified of the pendency of said bill in chancery, nor did they or either of them appear to said bill; and that as to them said proceedings and decree are null and void; and that said decree was based on testimony taken by deposition, of the taking of which these plaintiffs had no notice.

The said plaintiffs further aver that under the inducement and false representations of said David M, Jacob M, and Job M, and without any consideration whatever, and in the utter ignorance of said fraud and of their respective rights in said premises, they did, after coming of age, respectively quitclaim to each of said parties, D M, J M, and Job M, all their interests in the lands so set off in partition to the said D M, J M, and Job M, and the said D M, J M, and Job M, also released to plaintiffs respectively all their interests in the premises set off to said plaintiffs; and the plaintiffs say that they knew nothing of said suit, were inexperienced in business, and lived with their said brothers and relied on them to protect them in their rights.

The said plaintiffs further say that said Sarah J, was married to said on or about the day of , A. D. 18 , and the said Mary Ann to the said on or about the day of , A. D. 18 , and that at the time of said marriages the said plaintiffs were each entirely ignorant of the wrong and injustice so done to them by their said brothers, and that since said marriages, to wit, on or about the day of , A. D. 18, the said fraudulent proceedings and decree came to their knowledge, and for the first time they learned that they were each entitled to one-fifth of all of said real estate, of which their said father, J M, died seized as is aforesaid set forth and stated; and the said plaintiffs aver that their said father never made any such agreement with each of said defendants, to wit, said D M, J M, and Job M, as was averred in said above-recited petition; but, on the contrary, said plaintiffs aver that, if any such agreement was made, it was designed by their said father, and was received by said D M, J M, and Job M

as an advancement to them respectively made by their said father, and should have been in said proceedings and decree so treated, and said plaintiffs have had on partition out of said home farm a value in land amounting to one-fifth of all said lands of which their said father, J M, died possessed.

The said plaintiffs pray that said decree in partition, and said deeds of release and quitclaim so made by said plaintiffs, may be set aside and vacated, and that said plaintiffs may, out of said home farm, have set off to each of them what would be equal to one-fifth part of the lands of which their said father, J M, died seized; and that an account may be taken of the rents, issues, and profits of the said land which ought to have been assigned to them, and said D M, J M, and Job M may be decreed each their respective portion thereof; and for such other and further relief, as the nature of the case and equity may require,

THOS. J, Attorney for Plaintiff.

23. PETITION TO SET ASIDE A DECREE AGAINST A MINOR AFTER HE IS OF AGE.

The said plaintiff S V R, complains of the said S V V, A D, J W, V V R, M M F, and R F, her husband; L J R, J H R, E L; A R, a minor of the age of seventeen years, and W S R, a minor of the age of fifteen years; R W R, a minor of the age of fourteen years; J A R, a minor of the age of twelve years; E L A R, a minor aged nine years; and E R, a minor aged seven years, for that S R, heretofore, deceased, by his last will, duly executed and admitted to probate in the Probate Court within and for said county of , the said county being the county of his residence, made the following devise to the said plaintiff and his brother Z T R, to wit: "I give and bequeath to my grandsons, Z T R and S V R, one hundred acre lot number four hundred and twenty-three, in section twenty-four, township four, range fourteen, provided my said grandsons Z T R and S V R, in consideration of the above devise to them made, shall pay to the other children of their father, W R, as may be, the sum of twenty-five dollars to each, to be paid as follows: When the said Z T R shall become of age, or within six months after my death, as the case may be, then to pay such as may be of age, and thereafter as they, the said children, shall become of age. The said Z T R and S V R are to pay each equal shares in payment of said other children of said W R."

The plaintiff further saith that the said S V R departed this life on the 14th of September, A. D. 1866, while yet a minor of the age

of eighteen years or thereabout, leaving as his heirs at law the said plaintiff and the said defendants, V V R, M M F, L J R, W T R, R M R, J A R, E T A R, and E R, children of said W R.

The said plaintiff further saith that the said defendant, S V V, on the day of , A. D. 18 , while this plaintiff and said Z T R, then living, were yet minors, did file his petition in the Court of Common Pleas within and for said county of , to wit, in this court, against W R, L V, and L D V, her husband, heirs at law of said S R, deceased, and this plaintiff and said Z T R, then in full life, and the following defendants in this action, to wit, V V R, M M F, L J R, W T R, R M R, and J A R, setting forth that the said S R, in his lifetime, and the said S V Z, about the year A. D. 1854, entered into a parol agreement, whereby in consideration that the said S V Z would not remove to the West, and pay twenty-five dollars per year to said S R during his life as he wished it, would pay the taxes on the land therein set forth, and pay the two sisters of said S V Z six hundred dollars or thereabout, as said S R should by his will bequeath to them, said S R gave him the possession of the lands therein set forth, and said S R was to make him, said S V Z, such title thereto by will or otherwise that he, said S V Z, would hold said lands in fee simple upon the death of said S R; and further setting forth that he, said S V V, took possession and still holds possession of said premises, to wit, (*here describe the land,*) and had on his part performed all considerations on his part to be performed, except paying said sum of six hundred dollars to his two sisters, said S R having failed in his said last will and testament to bequeath said sum of six hundred dollars to the sisters of said S V V; and further setting forth in said petition the death of said S R, the devise of said S R in his said will made to this plaintiff, and the said Z T R, now deceased, of the lands hereinbefore described, the same being a portion of the lands a conveyance of which was so demanded in said petition; and the said plaintiff further saith that one L P, Esq., was appointed guardian to the said action of the said plaintiff and said Z T R, then in full life, as minor defendants, and filed an answer simply denying the facts and averments contained in said petition, and such proceedings were afterward had in said action, that at the term of the court, A. D. 18 , and while this plaintiff and said Z T R were minors, this court decreed the specific performance of said pretended agreement, and decreed this plaintiff and said Z T R should release their title derived to them under said will to the said S V V in fee simple.

And the plaintiff further avers that he became of age on the 18th day of June, A. D. 1871, and he now comes and denies that the said S R ever made any such agreement with the said S V V as the said S V V did in said petition set forth and aver.

And the said plaintiff further saith that the guardian aforesaid failed to present all the defense there was to said action, he having filed a simple denial, whereas said guardian should have set up against said petition that if said imperfect agreement was ever made, there had taken place such a change of circumstances, that rendered it inequitable for the court to execute said pretended and imperfect agreement; that the said testator, S R, must not so have regarded said understanding between himself and said S V V; the said testator, in his said last will and testament, devised to the said S V V a part of the lands so demanded in the petition of said S V V, to wit, all that part of the land known and described as commons A in section No. 18, T. 4, R. 14, in the said county of , which lies north of a line running east from the southeast corner of 100-acre lot, No. 423, sec. 24, T. 4, R. 14, except about eight acres sold by testator to L D V, the same containing about sixty-five acres, and being land more than sufficient to compensate said S V V for all consideration he had in any way paid, and for all expenses he had incurred on said lands, besides that the said S V V had the use and occupation of the lands so demanded in his said petition during the life of said testator, from the time said testator let him into possession thereof, which use and occupation was reasonably worth more than all improvements thereon by the said S V V; and the said testator having failed in his will to direct how and to whom said sum of $600 should be paid, and having omitted all mention of the two sisters of said S V V in his will in connection with said $600, it had become impossible for said court to carry said pretended agreement into execution without injustice to this plaintiff and his said brother, and to the sisters of S V V; yet the said court proceeded in disregard of these considerations, which were probably never brought to its attention, to decree an execution of said pretended agreement, and compelled the plaintiff and his said brother to release the said title so in them vested by said will, and that without requiring the said S V V to pay the said sum of $600, which said S V V admits he was to pay to either this plaintiff and his said brother, or to any other person whatever, whereas this plaintiff avers that, if said pretended agreement was to be executed in equity, the said sum of $600 ought to have been decreed to be paid to this

plaintiff and his said brother, the said testator having devised to them all his interest therein; and said plaintiff further avers that said pretended agreement, as set out in the petition of said S V V, is imperfect and incomplete in this, that the terms as to the disposition of said sum of $600 were incomplete, and left unfixed and not settled, and to depend on the will of the said S R, and hence, that part of said pretended agreement never was any binding agreement on said S R, and that the testator must and did so understand said pretended agreement as not binding on him, as he devised said sixty-five acres to said S V V, and a portion of the land demanded by said S V V in his said petition, to his son W R, and the balance to his grandsons, the plaintiff and his said brother, Z T R, and thus made among his children and grandchildren what he deemed at that time an equitable and reasonable disposal of his estate; which claim of said S V V, and decree in his favor, wholly disarranged the disposal of said testator of his estate, and thereby worked great injustice to those he, said testator, wished to benefit, and wholly defeated his last solemn intention as to the distribution of his estate among his children and grandchildren, the said S V V being also a grandson of said testator.

And the said petitioner further avers that he can now show by other witnesses than those examined on the hearing of said petition of S V V, and of which testimony neither his guardian for the action nor his father and friends were aware, and which has since been discovered, showing that said possession of said premises by said S V V was given to him by said S R for his own life, and no longer, and proving admissions made by said S V V that he did not claim the fee simple of said lands, and that he declined, for that reason, to allow timber to be cut on said premises, but referred persons wishing to cut timber thereon to the said testator for such permission; that said S V V said he had no such interest in said premises as authorized him to do, or allow to be done, any such acts thereon, and other new matter showing that said agreement set forth in said petition was never made.

And said plaintiff further saith that since said decree, the said S V V has sold and conveyed twenty acres of said 100-acre lot above described, unto said , and the balance of said 100-acre lot to said , they well knowing how the said title was obtained, and the rights of the plaintiff and his said brother after coming of age, to contest the truth and equity of said decree.

The plaintiff, therefore, prays that said decree may be vacated and set aside, and said one-half of said 100-acre lot be decreed to

said plaintiff, and the other half to the said heirs of said Z T R, and for such other and further relief as equity and the nature of the case may require.

S W, Attorney for Plaintiff.

This and the preceding form were taken from actual practice; the first was drawn from the case of Long *v.* Mulford, 17 Ohio St. 484, and the other from a case coming up in my own practice. In the above case, the court held that a minor on coming of age may, by an original action, contest the justice of the original decree. The practice in England is sometimes to obtain, by motion, leave to file a new answer and retry the case, or by petition, as that word is understood in England. Section 386 of the code, and section 534, subdivision 8, are the only ones which refer to this subject; the first says cause must be shown within one year, and the last gives the court power to modify such a judgment taken against a minor. Section 536 shows that it shall be done by petition verified by oath, setting forth the judgment, the grounds to vacate or modify, and the defense to the action. But the above case holds that it may be done by original petition, and must be so done in case there has been any transfer of the title, as was the case in the second form of a petition. These forms will serve as an outline of a petition, which may be adapted to almost any case that may arise.

24. PETITION OF ONE FIRM *v.* ANOTHER, WHERE ONE MAN IS IN BOTH FIRMS.

A B and C D complain of the said E F, J K, and L M, for that heretofore, to wit, on or about the day of , A. D. 18 , the said A B, C D, and L M entered into partnership, under the name of A B & Co., for the carrying on certain business in partnership, in the city of , in the county of , and the said E F, J K, and said L M also, on or about the same time, formed a partnership under the name of E F & Co., for carrying on in partnership certain business agreed on between said defendants, in the city of in the State of . And the said plaintiff avers that there were large dealings between the two said firms within the scope of their respective business; and that the said firm of , defendants, became largely indebted to the said firm of A B & Co., upon an account current, which had accrued to the said firm of A B & Co. against the said firm of E F & Co., arising from divers dealings between the said two firms; and that the firm of A B & Co. had transmitted to said firm of E F & Co. large quantities of produce,

goods, and merchandise, and had advanced and paid money for said firm of E F & Co., while said firm of E F & Co. had made advances and paid money to and for said firm of A B & Co., whereby the account showed charges in favor of the firm of A B & Co. against said firm of E F & Co. to the amount of dollars and cents, and said account showed credits to said firm of A B & Co. and in favor of E F & Co. to the amount of dollars and cents, and leaving a balance due from the firm of E F & Co. to the firm of A B & Co. in the sum of dollars and cents;* but which accounts remain unsettled. And said plaintiff further saith that said L M refuses to join with said A B and C D in an action to settle said account, and said L M has been made a defendant. And the said plaintiffs here produce a copy of said account, showing the various items thereof and the balance above claimed to be due on said account current.

Wherefore the said plaintiffs ask that an account may be taken of the dealings between said firms, and the balance due the plaintiff's firm be found, and said defendant firm be required to pay the same, and for such other relief as the nature of the case may in equity require.

W V P, Attorney for Plaintiff.

If there has been a settlement between the two firms, that fact may be stated in lieu of the words averring no settlement.

And the plaintiffs further aver that on or about the day of , A. D. 18 , the said firm of A B & Co. came to a settlement and adjustment of said accounts, and there was then found due and payable from the firm of E F & Co. to the firm of A B & Co. the sum of dollars and cents, and which sum said firm of E F & Co. have refused and neglected to pay to said firm of A B & Co., though often requested so to do.

Wherefore the said plaintiffs demand a judgment against said defendants for said sum of $, so found to be due and owing, with interest from the day of , A. D. 18 .

NOTE.—The above to come in after the *.

This form is copied substantially from the case of Cole *v.* Reynolds, 18 N. Y. 74. The case gives the law in such a case, where one is member of two firms, between which dealings have taken place. No suit at law can be sustained, but the matter must be adjusted by a suit in equity. The reason is, a man can not sue

himself. 1 Story's Eq. sec. 680; Story on Partnership, sec. 235; Bosanquet *v.* Wray, 6 Taunt. 597; Mainwaring *v.* Newman, 2 Bos. & Pul. 120. "In equity," says Story, "all contracts and dealings between such firms, of a moral and legal nature, are deemed obligatory, though void at law. Courts of equity in all such cases look behind the forms of the transactions to their substance; and treat the different firms, for the purposes of substantial justice, exactly as if they were composed of strangers, or were in fact corporate companies."

25. ASKING AN INJUNCTION AGAINST ONE WHO COVENANTED NOT TO PRACTICE AS PHYSICIAN WITHIN CERTAIN LIMITS.

The said A B, plaintiff, complains of the said C D, defendant, for that before and at the time of the making of the agreement hereinafter set forth, said plaintiff and said defendant were both practicing physicians and surgeons in the of , in the county of , and that on the day of , A. D. 18 , the said plaintiff and said defendant entered into the following agreement, in writing, and which agreement was in the words and figures following, that is to say, (*here set out agreement such as made.*)

Wilksville, August 21, 1869. This agreement made and entered into by tween the said A B and the said C D, witnesses that the said C D, in consideration of $, by the said A B to him in hand paid, agrees with the said A B that he, the said C D, will and shall from and after this date cease wholly to practice as a physician and surgeon within the following limits, to wit, within ten miles of the now residence of said C D, in said town of W , which said agreement was duly signed by said C D, and delivered to the said A B; yet the said plaintiff saith that said defendant, not regarding, and in violation of his said agreement, to wit, on the day of , A. D. 18 , did commence again the practice of a physician and surgeon, at the said town of W , and within the distance of ten miles of his former residence in said town of W , and ever since has continued to practice as a physician and surgeon at the place aforesaid, and within the bounds aforesaid, to the great damage of the said plaintiff; and that said C D says that he will continue to practice as aforesaid, in violation of his said agreement, and to the great injury and damage of said plaintiff.

Wherefore plaintiff prays that a provisional injunction may be

granted, restraining said C D from so practicing as a physician and surgeon at said place, and within the limits aforesaid, until the final hearing of this case, and on the final hearing a perpetual injunction, as aforesaid, may be granted, restraining defendant from practicing as aforesaid, and an account may be taken of the damage sustained by defendant from the said C D having so violated his said agreement; and for such other and further relief as the equity and nature of his case may require.

N O, Attorney for Plaintiff.

As to the law on contracts of this character, *vide* Lange *v.* Werk, 2 Ohio St. 519; Thomas *v.* Adm'r of Miles, 3 Ib. 274; Dunlap *v.* Gregory, 10 N. Y. 241; Chappell *v.* Brockway, 21 Wend. 157; Nobles *v.* Bates, 7 Cow. 309; 2 Saund. 156, note 1; Hitchcock *v.* Coker, 6 Ald. & Ellis, 438; Mitchell *v.* Reynolds, 1 P. Wms. 181. As to injunction: Butler *v.* Borleson, 16 Vt. 176; Crutwell *v.* Lize, 17 Ves. 335; Williams *v.* Williams, 2 Swan, 253; 3 Daniel Ch. Pr. 1874.

26. TO REFORM A CONTRACT.

The said A B, plaintiff, complains of said C D, defendant, for that heretofore, to wit, on the day of , A. D. 18 , the said plaintiff contracted with the said C D, (*here set out the true agreement as the plaintiff claims that it was,*) and that said plaintiff and defendant procured one to reduce said agreement to writing, and stated over to said the agreement aforesaid, as they supposed correctly, and that said reduced, as he supposed, said agreement to writing, in the words and figures following, that is to say, (*here copy the written agreement literally,*) and the said agreement was signed by said parties, (or, by the said , *if only one signed it,*) and with the mutual understanding of said plaintiff and defendant that said written agreement was in conformity to the agreement so made and entered into by and between said plaintiff and defendant; but the said plaintiff avers that there was a mistake in reducing said agreement to writing, in this, to wit, that by the agreement made it was agreed that (*here set out the true agreement in the particular where the mistake is*), and that there was a mutual mistake in the agreement as reduced to writing, in this, to wit, (*here set out the written agreement, so as to show wherein the mistake is, and then proceed to aver what the written agreement should have been,*) whereas the plaintiff avers that said written agreement, instead of being in the words so written, should have been in this particular written as follow, (*here set out the words that should*

have been written, in place of the words actually written,) and the said plaintiff avers that said scrivener writing said agreement made said mistake by misunderstanding the agreement as stated to him as aforesaid, and by the mutual mistake of said plaintiff and defendant the said error in said agreement was not discovered, at the time of signing the same, by either of said parties thereto; but said plaintiff and defendant signed the same with the mutual belief and mistake that said written agreement corresponded with the said agreement so made between said parties.

The plaintiff further saith that a dispute has arisen between said plaintiff and said defendant as to the true meaning of said written agreement, and said defendant now unjustly claims to enforce said agreement in accordance with the same as so reduced to writing, against this plaintiff, contrary to equity and good conscience.

Wherefore the plaintiff prays that said written agreement may be reformed, and made to correspond with the agreement actually made, and for such other and further relief as equity and good conscience may require.

F A N, Attorney for Plaintiff.

The above form may be made to answer any case that may arise. The reformation of written agreements is a subject of equity jurisdiction, and the rule of the court is, having obtained jurisdiction for the purpose of reforming the written agreement, it will go on, and do complete and full relief for the party under the agreement. There are two classes of cases; one where the relief is equitable on the contract as reformed, and the other where the remedy is legal. In the former case, both the correction and relief may be sought in the same petition; and in this class the court having jurisdiction to reform the contract, will, in most cases, go on and grant the relief wanted on the reformed agreement. Even where the remedy is at law on the reformed agreement, a court of equity will, after correcting the agreement, proceed to grant full and complete relief on the reformed agreement; for, having lawful jurisdiction of the case, it will not subject the parties to a suit at law, but grant the relief which could be obtained at law itself.

In Newcomer *v.* Kline, 11 Gill & Johns. 457, the court held that a bill in equity would lie to correct a bill single, in which the word *dollars* had been accidentally omitted, and to enforce its collection against both principal and surety therein. Although in such a case assumpsit would lie, yet the remedy is not so ample as to prevent a court of equity from taking jurisdiction to enforce the

original contract, the bill given being void at law. So a court of equity has jurisdiction to decree the repayment of money paid by mistake, notwithstanding the legal remedy by assumpsit. Wilkins *v.* Woodfin, 5 Munf. 183; Willis *v.* Henderson, 4 Scam. 13; Butler *v.* Durham, 3 Iredell Ch. 589; McCrae *v.* Hollis, 4 Desau. Ch. 122; Waggoner *v.* Minter, 7 J. J. Marsh. 173; Pugh *v.* Chesseldine, 11 Ohio, 109; Mahan *v.* Reeve, 6 Blackf. 215. In the case of Willis *v.* Henderson, *supra*, the court say, it is competent for a court of chancery to correct mistakes in instruments of writing of all kinds, and upon a proper case, in the same suit, to grant relief upon the instrument, when corrected in the same manner, as if it had been made perfect in the first instance. It is well settled that, if the jurisdiction of a court of equity attaches, it will go on to do complete justice, though in its progress it may decree on a matter which is cognizable at law. Cathcart *v.* Robinson, 5 Peters, 263. So, where jurisdiction is acquired to obtain a discovery, the court, being thus in possession of the case, will go on to determine the whole matter in controversy. Russell *v.* Clark, 7 Cranch. 69; S. P., Miller *v.* McCan, 7 Paige Ch. 457; Walcott *v.* Sullivan, 1 Edw. Ch. 399; Oldham *v.* Jones, 5 B. Mon. 458; Miami Exp. Co. *v.* U. S. Bank, Wright, 249; Oliver *v.* Pray, 4 Ohio, 175. In this case it is said that, where a court of equity gains jurisdiction of a cause for one purpose, it may retain it for all. Brown *v.* Gardner, Harring. Ch. 291.

These cases show the rule, that where jurisdiction is obtained to correct a mistake, the court, having corrected the mistake, can go on to administer complete relief on the reformed agreement. This matter is discussed elsewhere, and nothing more need be said here.

27. PETITION AGAINST A MARRIED WOMAN TO CHARGE HER DEBT ON HER SEPARATE PROPERTY.

The said A B complains of the said C D, and E F, his wife, for that the said E F is a married woman and the wife of said C D at the time of the several agreements made and proceedings had herein stated, and that the said E F is seized of, and holds as her separate property and estate, the following real estate, (or, the following personal property,) situate in the said county of , to wit, (*here describe the real estate as on a suit to foreclose a mortgage*, or, *if it is personal property, then describe it.*) and being so seized of said real estate as her separate property, (or, being so possessed of said personal property as her separate estate,) did, on or about the day of , A. D. 18 , contract with said plaintiff to

make certain improvements thereon, (*here set out what they were*,) for the sum of dollars and cents, and said plaintiff agreed to make said improvements on said real estate for said sum of money above stated, (or, *if no price is agreed on, then aver for a reasonable price therefor*, to be paid to said plaintiff by said E F;) and the said plaintiff avers that it was then and there understood and agreed by and between said plaintiff and said E F that her separate property was bound for the fulfillment of the contract on her behalf, and the payment of said sum of money so to be paid to plaintiff for making said improvements as aforesaid; and the plaintiff avers that, relying on said agreement of said E F, he proceeded and made said repairs, as provided for in said agreement, in a good and workmanlike manner, and within the time agreed on, (or, in a reasonable time, *if no time is stated in agreement*,) and thereby became and was entitled to be paid said sum of money by said E F, on the day of , A. D. 18 , and that he thereupon notified said E F of the completion of said improvements, and demanded of her the payment of said sum of $, with interest thereon from the day of , A. D. 18 , but that neither the said E F, nor the said C D, her husband, has paid said sum of money, nor any part thereof; and the plaintiff avers that he has a right to subject said real estate of said E F to the payment of said claim. (*Insert prayer as in next form.*)

28. PETITION TO REACH THE SEPARATE PROPERTY OF A WIFE ON A DEBT OF HUSBAND, SHE BEING SURETY THEREON.

The said A B complains of the said C D, and E F, his wife, for that at the time hereinafter named, said E F was the wife of said C D, and was seized and possessed of the real and personal property hereinafter described, and being so seized and possessed of said separate property in her own right, did jointly with her husband, for a loan of the money stated in the note hereinafter set forth, made by the plaintiff to the said C D, execute and deliver to the said plaintiff the following promissory note, to wit, (*here set out note or contract*,) and then and there and thereby intended and agreed that her said separate property should be liable for the money named in said promissory note, if the same was not, and should not be paid by her said husband, C D, when the same become due and payable, according to the tenor and effect of the said promissory note; and the plaintiff avers that he did, on condition that the said E F would sign said note as surety for her said husband, C D, and agree that her separate property aforesaid should be

bound and held liable for the payment thereof, loan said sum of money to said C D, and took the joint note of said C D & E F, and said E F promised then and there that her said separate property was and should be held bound and liable for the payment thereof; and the said plaintiff further avers that the said C D did not pay said promissory note when the same became due and payable, nor has either said C D or the said E F since paid said promissory note, nor any part thereof, but the whole sum of $ is still due and unpaid; and the said plaintiff further avers that at the time of giving the said promissory note and now the said E F was seized and possessed of the following real and personal property, situate in said county, and described as follows, to wit, (*here set out the property,*) and which property the plaintiff avers is liable in equity to the payment of the sum named in said promissory note, to wit, the sum of $, with interest thereon from the day of , A. D. 18 .

Wherefore the plaintiff prays that an account may be taken of the amount due on said promissory note with the interest thereon, and that in case said defendants fail to pay said sum so found due him by a day to be named by the court, an order may be made that said premises, or so much thereof as is needed to pay the same and costs, be sold by the sheriff of this county, and for such other and further relief as equity and the facts of his case may require.

S N, Attorney for Plaintiff.

The two preceding forms are predicated on the case of Logan *v.* Thrift and wife, 20 Ohio St. 62, and the case of the Corn Exchange Ins. Co. *v.* Babcock et al., 42 N. Y. 613. The first case goes off on the ground that the wife in that case had no separate property. The latter case decides that the wife's separate property was liable for a debt of her husband's when she wrote on the note evidencing the debt the following indorsement, to wit: "For value received I hereby charge my individual property with the payment of this note. Armina Babcock." In this case a majority of the court held that a personal judgment could be rendered against the wife, on which her property could be sold, while the case of Yale *v.* Dederen, 18 N. Y. 265; S. C., 22 N. Y. 450, holds that the wife's separate property could not be charged with the payment of a note signed by her as surety of her husband. In this last case, the court held that the intent of the wife to bind her separate estate could not be proved by parol.

In my opinion the law will not sustain the position that a per-

sonal judgment can be rendered against her. The former rule in equity as to the separate equitable estate of the wife, was that under certain circumstances she could bind her estate in hands of her trustees for her own debt, and in certain cases as surety for her husband's debt. The statutes as to married women nowhere create any liability against her; they simply declare her power to manage her separate property independent of the control of her husband. The law nowhere changes her legal status as a wife, or her legal inability to contract; the courts only apply the law to her separate property under the statute which was before applied by a court of equity to her equitable separate property, as that term was understood in equity. This case is, therefore, in conflict with every other case in this respect. In Yale *v.* Dederen, 18 N. Y. 272, Judge Comstock says: "A married woman may, as incidental to the perfect right of property and power of disposition, which she takes under the statute, *charge her estate* for the purposes and to the extent which the rule in equity has heretofore sanctioned in reference to separate estates." And in the same case (22 N. Y. 451), Judge Selden says that it was settled in that case, when first before the court, "that the power conferred upon married women by these statutes to hold to their separate use, and to convey and devise all their real and personal estate, as if unmarried, carried with it the power to charge such estate substantially in the manner and to the extent previously authorized by the rules of equity in respect to separate estates."

"By the common law," says Earle, J., in his dissenting opinion, "the contracts of married women are always void, and can not be enforced against them. But in equity, a married woman having separate estate has, for more than a century in England, been treated, as to such separate estate, as a *feme sole*, and capable of charging such estate in equity with all her debts and obligations. . . . So that in England it has been settled for a long time that the separate estate of a married woman is charged with all her debts and obligations, without any express intention so to charge it. This intention is always implied unless the contrary is proved. Hulme *v.* Tennant, 1 Br. C. C. 16; Murray *v.* Borlee, 3 My. & K. 220; 1 White & Tudor's Leading Cases in Equity, 324. The rule thus settled in England, was at an early day substantially adopted in this State. Jacques *v.* Methodist Episcopal Church, 17 Johns. 548; North American Coal Co. *v.* Dyett, 7 Paige, 9; S. C., 20 Wend. 570; Knowles *v.* McComby, 10 Paige, 343; Vanderheyden *v.* Mallony, 1 Comst. 453. Finally, in the case of Yale *v.* Dederen, a

single qualification for the first time in this State was added to this rule. It was held that, unless the consideration of the contract was one going to the direct benefit of the estate, the intention to charge the separate estate must be stated in and be a part of the contract. With this single qualification, the English rule in equity I believe to be the law in this State."

"The equitable charge thus created by the defendant, could be enforced only in equity. This action, however, seems to have been commenced and tried, and was decided as an action at law. A personal judgment was rendered against the defendant, with the other parties to the note for money; and in this there was manifest error. She is the only party who appealed from the judgment, and the only question for us to consider is, whether the judgment was authorized as against her; and if not, what shall we do with it?" Earle, J., held that the proper judgment as to Mrs. Babcock, should be to find the amount, and adjudge the same to be a charge upon her separate estate, to be levied and collected by execution. But I think he has gone even here too far; the judgment should be an old decree in chancery, finding the amount, and ordering a sale, in case the sum was not paid before a certain day. To do this the property must be described in the petition, as in all cases where specific property is to be subjected to the payment of a debt.

ANSWERS.

The answer, in a chancery cause, is altered much more by the code than the structure of the petition is. The answer now need cover only so much of the case as the party denies; the matter unanswered being taken to be admitted. And as the whole right to discovery, as discovery, is abolished, the defendant is bound only to meet the case made by the plaintiff in his petition; he can not, as we see, set up the facts as he understands them; because that would be a discovery of his knowledge of the facts, which facts might make a new case, instead of meeting that of the plaintiff. The truth is, the code has restricted an answer in an equity case to the strictness of a common-law pleading; it can consist of but two matters: *First.* A general or special denial of the plaintiff's case, as made in his petition; *Second.* New matter, constituting a defense, counter-claim, or set-off; but as set-off and counter-claim can not be known in a case strictly of equitable nature, the answer must contain new matter, which, if true, in law defeats the plaintiff's right to relief—as a plea to a petition by one partner against

another of no partner, a plea of the statute of frauds, etc.—so a settlement, or release, etc., may be pleaded. Whether justice is to be subserved by this rigid system of pleading in equity cases, is much to be doubted. It places the defendant very much in the power of the plaintiff and the court. He can not set up in his answer a different state of facts from what the plaintiff has done in his petition; and as he can but deny this, he is at the mercy of the court, who can permit the plaintiff, by amendment, to make a case which he never had an opportunity to prepare to meet. Under the former system of pleading in chancery, the defendant set up the case as he understood it, after denying the case as the plaintiff had stated it. The plaintiff could then either amend, to make his case correspond with the case as stated by the defendant, or he could go to hearing on the case as stated by himself; and then he could not recover, if the evidence failed to establish the case as stated by himself. A complainant in equity was held to recover only on the case made by himself, and he could recover on no other. But now, under the unlimited discretion vested in a court, to allow amendments at the trial, and to proceed in the case, a defendant never can tell when he is safe, unless he is at the expense of trying not only the case as made by the plaintiff, but every other possible aspect of the case which the evidence may disclose. No continuance can be granted, unless the court thinks the party has been taken by surprise; and what is a surprise is a matter not so easy to decide. The court will probably say that the party must have known the exact facts of the case, and why did he not prepare to meet them? All the answer he can make is, I prepared to meet the case made, and had no right to make expense in meeting any other. If the court thinks otherwise, then the party is amended into a case which he has never had a chance to defend; and judgment is rendered against him without his ever having had practically a day in court; because, knowing the plaintiff might have some kind of a case against him, though not the one sued on, the court thinks he should have prepared himself to meet that case, instead of the one made in the pleadings. It may be this is an improvement in the practice of a court; but it will be found to be no improvement in the administration of justice.

The form of an answer, therefore, must, in each case, depend solely on its character. The statute of limitations and fraud will be pleaded as at law; so will also a release, or settlement, or infancy, etc. The forms at law will answer in all actions founded upon principles of equity. In accounts, trusts, etc., if the defend-

ant can not deny the trust, or the fact which constitutes the right to an account, the decree or judgment for the account must pass, of course, and the whole matter must be gone into before the master. The defendant can no longer set up in his answer a statement of the account. He must deny his liability to account, or he has no defense; the condition of the accounts is a matter for the matter. To a petition by a partner for an account, he can deny the partnership; for on that fact rests the right of the plaintiff to call for the account; or he may set up a new fact, which, admitting the partnership, shows that the right has been extinguished—as by an account and settlement, or a release, or by a purchase in gross of the interest of the plaintiff in the partnership property, etc. So a party may deny that he is a trustee; or, admitting that he was, he may set up any fact which legally extinguishes that relation between him and the plaintiff. So, on a petition for specific performance, he may deny any contract; he may set up that it was not in writing, or, in a case of part performance, he may deny the facts set up as a part performance, or he may deny that he gave the plaintiff possession, or that he knew of the improvements; or possibly he may plead that the plaintiff was in possession as tenant, and not as purchaser, and did all the acts as such tenant, and not under his said contract of purchase; though a denial that there had been any part performance, as stated in the petition, would probably be all that is necessary; as the facts, and circumstances, and doings of the party would be mere evidence to prove the part performance. It may be doubtful whether a petition should do more than state that the vendor put him in possession of the premises, and that he has cultivated and improved the same, as his own, from the time when so put into possession until the plaintiff undertook to eject him or until the commencement of the suit; and the case of Wooden *v.* Strew countenances this doctrine. 10 Pr. 48.

Where the defendant wishes to interpose a general denial, he may do it in the general form already given—as that the defendant denies, all and singular, the averments and allegations contained in the said petition. Special denials must of course, take issue on some one particular allegation in the petition; and then it will be expressed in the negative of the averment in the petition. There can be no difficulty in framing such denials, since their form is controlled by that of the form of the averment.

I. *General Denial.*

29. GENERAL FORM.

The said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that he denies, all and singular, the matters and things, and, all and singular, the allegations and averments contained in the petition of the said plaintiff, in manner and form as the same are therein set forth and stated.

This general form will answer in all cases where the defendant can say that the *case* stated is untrue. As has already been said, the defendant is not called upon to meet any case but the one stated in the petition; hence, if the plaintiff has made a mistake in setting out his case, the defendant has no other defense than to deny the case made; since he can not be permitted to set up the dispute as he understands it.

II. *Special Denials.*

30. DENIAL OF THE AGREEMENT ALLEGED.

The said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that he did not contract and agree with the said plaintiff, in manner and form as the said plaintiff hath in his said petition set forth and alleged.

31. A SECOND FORM.

The said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that he did not make with the said plaintiff the said agreement, by the said plaintiff set forth and alleged in his said petition.

32. DENIAL OF A DEED.

The said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that the said plaintiff did not execute and deliver to the said defendant the said deed of conveyance, in manner and form as the said plaintiff hath in his said petition alleged.

33. A SECOND FORM.

The said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that the said plaintiff did not convey to the said defendant the lands and tenements in the said

petition described, in manner and form as the said plaintiff hath thereof in his said petition alleged.

34. MORTGAGE NOT RECORDED.

The said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that the said plaintiff did not cause the said deed of mortgage to be recorded, in manner and form as the said plaintiff hath in his said petition alleged.

35. EQUITY OF REDEMPTION NOT ASSIGNED.

The said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that the said did not convey his equity of redemption in and to the said premises, in said petition described, in manner and form as the said plaintiff hath in his said petition alleged.

36. MORTGAGE NOT ASSIGNED.

The said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that the said did not, by deed duly executed, convey all his right and title, as such mortgagee, in and to the said premises, in manner and form as the said plaintiff hath in his said petition alleged.

37. NO EQUITABLE ASSIGNMENT.

The said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that the said did not assign and transfer to the said defendant the note in said deed of mortgage mentioned, and the money due thereon, in manner and form as the said plaintiff hath in his said petition alleged.

38. SPECIFIC PERFORMANCE OF CONTRACTS.

1. *No contract, as above.*

2. That the said plaintiff did not pay to the said defendant the said sum of $, in manner and form as the said plaintiff hath in his said petition alleged.

3. That the said plaintiff did not tender the said sum of $ to the said defendant, in manner and form as the said plaintiff hath in his said petition alleged.

4. That the said plaintiff did not put the said defendant into the possession of the said premises, in manner and form as the said plaintiff hath in his said petition alleged.

5. That the said did not take possession of the said premises, and do the said acts, and make the said improvements thereon, under, and by virtue, and in part performance of, the said contract of sale and purchase, in manner and form as the said plaintiff hath in his said petition alleged.

6. That the said plaintiff was not seized in fee simple of the said premises, and could not make to the said defendant a good and sufficient title thereto, as by his said contract he was bound to do.

39. CREDITOR'S ACTION.

The said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith—

1. That there is no record, remaining in said court, of such recovery as the said plaintiff hath in his said petition alleged.

2. That the said has goods and chattels, lands and tenements, liable to execution for the satisfaction of the money due on the said judgment.

3. That the said has no goods or chattels, or effects of the said plaintiff, in his hands and custody, in manner and form as the said plaintiff hath in his said petition alleged.

40. DENIAL OF A TRUST.

The said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that the said defendant denies that he received the said , in said petition mentioned, for the purposes and on the trusts aforesaid, in manner and form as the said plaintiff hath in his said petition alleged

41. DENIAL OF WASTE.

The said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith—

1. That the said defendant is not guilty of the waste and destruction aforesaid, in manner and form as the said plaintiff hath in his said petition alleged.

2. That the said defendant does not hold the said premises under, and as tenant to, the said plaintiff, in manner and form as the said plaintiff hath in his said petition alleged.

3. That the said did not demise the said premises to the said , in manner and form as the said plaintiff hath in his said petition alleged.

42. TO CANCEL NOTE.

The said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that the said promissory note was not executed and delivered by the said plaintiff on the condition and understanding by the said plaintiff in his said petition alleged; but the said defendant avers that the same was delivered by the said plaintiff, absolutely and without any condition whatever.

43. TO SET ASIDE A DEED.

The said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that the said defendant did not obtain the said deed from the said plaintiff by fraud and misrepresentation, in manner and form as the said plaintiff hath in his said petition alleged.

44. FOR AN ACCOUNT.

The said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that there are no such mutual dealings and accounts between the said plaintiff and defendant, in manner and form as the said plaintiff hath in his said petition alleged.

45. TO CORRECT A STATED ACCOUNT.

The said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that there are no such mistakes and errors in the stating of the said account, in manner and form as the said plaintiff hath in his said petition alleged.

The above are given as mere hints of what a special denial may be in a case founded on principles of equity. The object has been to make a material issue in the fewest words possible. The words "manner and form" are used because they have received such a construction that they put in issue only those circumstances of the averment which are material, and without proof of which the main fact can not be found to be proved. These special denials must, of course, depend mainly upon the facts of each particular case; and the pleader must exercise his own judgment in framing them. The denial must be of a material *fact*, and it must be of the *fact*, not of its incidents. Hence it becomes important that the pleader should be able to discriminate between the *fact*, as that word is legally expounded in pleading, and the *incidents* and *evi-*

dence of it. Where the charge is that a deed was obtained by fraud, a denial that the deed was obtained by fraud, in manner and form as alleged, puts in issue the facts of fraud charged in the bill, and nothing else; and the plaintiff is put to the proof of the case, as made in his petition. He must prove substantially the fraud, or acts of fraud, there alleged. The rule that the proof and allegations must correspond is just as strict under the code as under the old system of practice. It is only by an *amendment* that the effect of a variance can be avoided.

46. NO PARTNER.

And the said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that the said A B and the said C D were not partners in business, in manner and form as the said plaintiff hath in his said petition set forth; and this he is ready to make appear.

47. STATUTE OF FRAUDS.

And the said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that the said plaintiff ought not to have his said action; because he saith that neither he, this defendant, nor any person by him legally authorized, did ever make or sign any contract, or agreement in writing, binding this defendant to make any such conveyance of the said premises to the said plaintiff as he, the said plaintiff, has in his said petition demanded; and this the said defendant is ready to make appear.

48. SPECIAL DENIAL OF FRAUD.

And now comes the said C D, defendant, and for answer to the petition of the said A B, plaintiff, saith that he did not make the said representations, in manner and form as the same are in the said petition alleged, knowing the same, at the said time, to be false and untrue; and of this he puts himself upon the court.

49. DENIAL OF TRUST.

And now comes the said C D, defendant, and for answer to the petition of the said A B, plaintiff, saith that he, the said plaintiff, did not deliver, and the said defendant did not receive, the said bond and mortgage, in the said petition mentioned, upon the trust and confidence therein alleged; but the said plaintiff avers that he received the same as and for his own property, absolutely, and

without any trust thereto attached; and of this he puts himself upon the court.

This must be held sufficient. To set up the absolute facts of the transaction is only setting up the evidence, which shows that there was no trust, and on that ground such a plea or answer would be objectionable. This answer must admit all the evidence tending to show the fact of trust, or no trust.

50. SPECIAL DENIAL OF A PART PERFORMANCE.

And now comes the said C D, defendant, and for answer to the petition of the said A B, plaintiff, saith that he, this defendant, did not put the said plaintiff into, nor did he consent to the said plaintiff's taking possession of the said premises, under and in part execution of the said pretended sale and contract of the said premises, as charged in said petition; but the said defendant avers that the said , of his own wrong, and without the license, and against the consent of the said defendant, entered into said premises, and occupied and improved the same; and this he prays may be inquired of by the court.

51. BONA FIDE PURCHASER.

And now comes the said C D, defendant, and for answer to the petition of the said A B, plaintiff, saith that the said plaintiff ought not to have his action aforesaid; because he saith that the said defendant did, on the day of , A. D. 18 , buy of the said the said lands and tenements, *bona fide*, for the consideration of $, he, the said , then being in possession thereof, (*here state how and when paid, and if notes were given, aver the giving of them,*) and without any fraud or intent to hinder, or delay, or defraud the said A B, or the other creditors of the said , and without any knowledge, information, or belief that the said sold the said premises with the intent charged in the said petition; and this he is ready to make appear.

52. PLEA OF AN ACCOUNT.

And now comes the said C D, defendant, and for answer to the petition of the said A B, plaintiff, saith that the said plaintiff ought not to have his aforesaid action; because he saith that, after the said dealings in said petition named, and before the commencement of this action, the said A B and the said C D came to a

mutual accounting touching the several matters and things in said petition mentioned, and on the said accounting there was found due from the said to the said , $, as a final balance upon said mutual dealing and matters between the said A B and the said C D; and the said C D avers that to the best of his knowledge and belief the said stated account is just and true; and this he is ready to make appear.

It is said, in 2 Atk. 399, that stated accounts must be in writing. Still this is to be doubted; at least, it need not be averred in the answer: that would be matter of proof. But where the petition is brought to set aside an account for errors or fraud, this plea will not answer; then the answer must meet the averments in the petition which show the mistake or fraud in the stated account. An account made out by one, and sent to another, will become an account stated, if retained by the party without any objection being made thereto. 2 Atk. 252. The law as to a stated account is thus stated in a very recent case—that of Lockwood *v.* Thorn, 1 Kernan, 170. It is not necessary, to make a stated account, that it should be signed by the parties. It is sufficient if it has been examined and accepted by both parties. And this acceptance need not be expressed; it may be implied from circumstances—as keeping it any length of time. 12 Peters, 300, 334.

The ordinary pleas in equity are still good pleas in similar cases under the code. The most common ones in abatement are infancy, coverture, idiocy, and lunacy. Forms for these pleas have been already given; and those forms will answer in cases founded on equitable principles, as well as in those founded on legal principles.

So the defendant may plead that he or the plaintiff do not sustain the character in which they sue or are sued—as that the defendant is not a *feme sole*, or not heir, or administrator, etc. So a plea that the plaintiff is not the person he pretends in his petition to be, or that he does not sustain the character which he assumes is good. Story Eq. 563. So where one claims as heir, a plea may be interposed that he is not heir. 2 Ves. & Beames, 159; 2 Bro. Ch. 143; 3 Ib. 489. So if one sues as a partner, a plea that he is not a partner would be good. Sanders *v.* King, 6 Madd. 61. So to a bill by a plaintiff, as a creditor of an estate, a plea that he is not a creditor, and that the deceased was not indebted to him, is good. Thring *v.* Edgar, 2 Sim. & Stu. 274.

The forms of these pleas are mostly negative, and require very little skill to frame them. The following will serve as a guide:

53. ANSWER, NOT THE PERSON HE ASSUMES TO BE.

And the said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that said plaintiff ought not to have his said action; because he saith that the said plaintiff is not the executor of the last will and testament, (or, the administrator of the estate; or, heir; or, widow,) of the said , deceased, as the said plaintiff hath in his said petition alleged; and this the said defendant is ready to make appear.

To an action by an heir to recover real estate, the defendant may set up by plea a conveyance from the ancestor. So to a petition filed to set aside a conveyance for fraud, a plea of title paramount, under a former conveyance, may be pleaded in bar. So lapse of time may be pleaded—though this is a defense growing out of the evidence in the case itself—and effect would be given to it on the hearing; but still, if a party has no other defense, he must plead this. It seems probable that our present statute of limitations applies to cases in equity, as well as to those at law; and hence the doctrine of lapse of time no longer exists in Ohio, but a positive limitation is fixed by statute. The limitation of ten years will apply to trusts and other equitable rights, if no other will reach them. Section 18 provides that an action for relief, not hereinafter provided for, can only be brought within ten years after the cause of action shall have accrued. This limitation must, of course, be pleaded; but the forms already given are sufficient in all cases.

If the code is to be so construed, as it ought to be, that a defense in a case founded on principles of equity, can be made according to the law regulating pleadings in chancery, then the answer will, of course, first deny whatever in the petition the defendant claims to be untrue, and then set up any additional and new matter which avoids the case as stated. In this way a defendant can deny the contract as stated in the petition, and set it up as the defendant claims it to be; or he can deny facts as stated, and set them forth as he claims them to be. And this is still the practice under the code, as followed by the best lawyers. If the code does not admit of this pleading, it ought to be amended, so as to admit it.

The form of such answer is very simple. The following will serve as a skeleton of one:

54. ANSWER TO SPECIAL COUNTS.

And the said C D, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that he denies, (*here state what parts of the petition he does controvert; then any new matter admissible as a defense, by showing a different state of facts, a different agreement, or any new matter which bars a once existing right of action.*)

The answer now, even in this shape, is a mere pleading; and hence nothing but such *facts* as in pleading are called facts should be stated. All matters which are merely evidence of the fact should be omitted. Under the former system of pleading in equity, discovery, evidence of the real fact, was sought for; and this discovery, the statement of this evidence, constituted the greater portion of every answer: but the code has abolished all this, and left the petition in such a case the mere *stating* part of an old bill in chancery. This method must, of course, very much abbreviate the length of pleadings in a case founded on principles of equity, if the principles of the code are carried out in practice. All averments not denied are now taken to be true for the purposes of the case; hence a defendant need notice no averment of fact in the petition, unless he wishes to deny it, absolutely or qualifiedly. An absolute denial may be expressed in a simple negation of the averment; a qualified one, by a denial of the fact as averred; and a statement of it as the defendant admits the truth to be. The defendant, in the latter case, would say that he denies, etc., (*repeating the averment;*) but saith that he did, etc., (*here state the case or fact as he understands it to be.*) Suppose the averment to be met is one alleging a sale of real estate with the sum to be paid, and the times of payment, and that this statement is incorrect. The defendant would answer that he denies that he contracted to sell, and did sell, the said premises to the said plaintiff for the said sum of $, payable at the times and in the manner alleged in the said petition; but the said defendant saith that he did contract to sell, and did sell, to the said plaintiff the said premises for the sum of , to be paid by the said plaintiff to the said defendant, $, in one year, with interest; $, in two years, etc. So, if the petition in such a case included land, which the defendant did not sell, the defendant would deny that he sold the land described in the said petition, but say that he did sell the following described land or premises, setting them forth by metes and bounds. According to the strict letter of the code, the simple denial is all that is neces-

sary; because if the defendant is right in his view of the case, the plaintiff will be out of court on the trial, on a material variance: but then comes the unlimited power to amend the plaintiff into a case, which the defendant has never had an opportunity to meet; and whether he ever shall have such opportunity depends upon the mere untrammeled views of the court, as to whether the party is taken by surprise or has been misled in his defense. It may be policy in a plaintiff to misstate his case, and then on the trial amend it into shape, especially if he has a court which is loth to believe that a party can be misled by such misstatement. Such a trick may throw the adverse party off his guard, and mislead him in the preparation of his defense. And if such should be the case, still, if the court thinks he has not been misled, it can force him to go on, and render a final judgment in the case. Sec. 131. Surely a code which allows this is a liberal one.

55. ANSWER TO A PETITION TO ADJUST LIENS AND PROCURE A SALE OF REAL ESTATE.

And the said E F, defendant, now comes, and for answer to the petition of the said A B, plaintiff, saith that the said C D did, on the day of , A. D. 18 , convey the premises in the said petition described, to the said E F, in fee and mortgage, to secure the payment of the sum of dollars and cents, with interest thereon, at the rate of per cent. per annum, from the said C D to the said E F, which deed of mortgage was afterward, on the day of aforesaid, duly left for record with the recorder of said county of , and from which date of recording the lien of the said E F attached; and the said E F says that the said C D has paid on the same the following sums, to wit, $ on the day of , A. D. 18 , etc., and the said E F says that the balance of the said sum of dollars and cents is still due and owing from the said C D to him, and is, and has been, a lien on the said premises from the said day of , A. D. 18 , aforesaid.

56. ANSWER IN SIMILAR CASE, SETTING UP A JUDGMENT.

And the said G H now comes, and for answer to the petition of the said A B, plaintiff, saith that this defendant, on the day of , A. D. 18 , did recover, in the Court of Common Pleas, in and for the county of aforesaid, a judgment against the said C D, for the sum of dollars and cents, his debt, and dollars and cents, his costs in said action; and the

said G H says that the said judgment is in full force in law, and wholly due and unpaid, and is, and has been, a subsisting lien on said premises, from the said day of , A. D. 18 ; and further he saith not.

If executions have been issued and levied in order to perpetuate a lien, that fact should be stated, and the date of the levy, as the priority after the lapse of a year will depend upon the date of a levy.

These answers do not, in form and substance, conform to the code; and yet no other form is adapted to the nature of the case. Hence this must be adopted, either by virtue of a forced construction of the code, or because the code provides no remedy, and then we must go to the old law and practice.

END OF VOL. I.

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